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APPROACHING ENVIRONMENTAL CLEANUP COSTS LIABILITY
THROUGH INSURANCE PRINCIPLES

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency.

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42d JUDGE ADVOCATE OFFICER GRADUATE COURSE

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APPROACHING ENVIRONMENTAL CLEANUP COSTS LIABILITY
THROUGH INSURANCE PRINCIPLES

by Captain Michael A. Corbin

ABSTRACT: Congress admits that environmental cleanup costs liability threatens to crush our country's environmental cleanup effort. If the current liability scheme is not changed, then private industries may not participate in the effort. Applying insurance industry principles to environmental cleanup costs liability will provide a firm foundation to reduce the risk of loss to the taxpayer, reduce cleanup costs, and stimulate private participation in the cleanup effort.

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Captain Michael A. Corbin

I. Introduction.

Today our country is in the middle of its environmental cleanup effort. The growing problem of hazardous waste disposal has dramatically captured the attention of the American public. Currently, the environmental cleanup effort is threatened by cost liability.

The cost of hazardous waste cleanup is tremendously expensive while the pace of cleanup is very slow. There are around 1,270 Superfund sites.¹ Since 1980 over \$12 billion has been spent on Superfund sites alone and only 49 sites have been cleaned.² No one knows how many sites remain unidentified. The Environmental Protection Agency (EPA) estimates that more than 100 will be discovered through the year 2000.³ Cleanup at these sites will certainly cost billions of dollars and may take many decades to clean. If the current liability scheme is not changed, then the environmental cleanup effort may fail.

In order to spread costs and to accelerate the cleanup effort, statutes were enacted which strictly imposed environmental cleanup cost liability.⁴ These statutes made it easy to find an individual liable for millions of dollars in environmental cleanup costs. However, instead of aiding in accelerating the cleanup effort, these statutes are blamed for frustrating the effort. The allegations include discouraging the insurance⁵ and lending industries⁶ from participating in the

cleanup effort.

Under current liability schemes, commercial insurers are often found liable for environmental cleanup costs.⁷ Consequently, an insured and an insurer engage in expensive protracted litigation over cleanup cost liability.⁸ This litigation frustrates actual environmental cleanup. The cost to delay environmental cleanup is paid by the taxpayer.

Recently, the insurance industry took action to severely limit environmental coverage.⁹ Eventually, this will hinder the cleanup effort because limited environmental insurance coverage may cause responsible parties to aggressively litigate environmental liability amongst themselves rather than work toward remediation. Also, limited environmental insurance coverage will hinder the cleanup effort because hazardous waste cleanup contractors may not be willing to accept the risk of cleanup liability without substantial insurance coverage.

Limited commercial environmental insurance has forced the taxpayer to face paying environmental cleanup costs alone. The Federal government is attempting to structure hazardous waste indemnification policies for government contractors because commercial insurance is generally unavailable.¹⁰ Without commercial insurance the taxpayer must bare the risk of loss.

Some courts have found lenders liable for environmental cleanup costs even when the lenders are not directly involved with a cleanup site.¹¹ This has had a chilling effect on commercial, industrial and real estate lending. It has almost

frozen lending to hazardous waste contractors. Lender liability potentially will threaten the Federal deposits insurance.¹² Environmental cleanup cost liability could force federally insured depository institutions below minimum capital levels and force an institution into Federal conservatorship or receivership at a significant cost to the Federal deposit insurance funds.¹³ Consequently, taxpayers are threatened as insurers, indemnifiers, of the fund.

Environmental cleanup costs threaten the solvency of many lenders and insurers. If environmental cleanup regimes are not changed insurers and lenders will generally avoid the environmental cleanup effort. Taxpayers, who are the last level of indemnification, will eventually bare the risk of cleanup. This does not have to happen. It is possible to spread environmental cleanup costs. Many environmental cleanup costs indemnification problems can be solved if approached from the standpoint of an insurer. Understanding the structure of the insurance industry and established insurance principles can help create a firm foundation to resolve many cleanup costs indemnification problems. The government can use these principles to reduce the risk of loss to the taxpayer and encourage cleanup at a faster pace.

II. The Principles of Insurance.

The insurance industry is in the business of assuming

calculated risks for a reasonable profit. Liability insurance is an agreement to spread or shift a risk. The fear of an unabsorbable loss usually is a motivating factor for small businesses and individuals to purchase protection. In order to protect themselves individuals and businesses often purchase liability insurance despite a remote actuarial value of loss.¹⁴ In other words, most individuals and small businesses prefer to pay an insurance premium in order to transfer to a third-party the risk of suffering a large loss. This preference exists even when the actuarial value of that loss, the probability that the loss will occur multiplied by its expected magnitude if it occurs, is smaller than the premium.¹⁵ For example, an insured is often willing to pay \$55 to insure against a one percent chance of suffering a \$5,000 loss, although the loss has an actuarial value of \$50. By gathering a large number of these risks insurers will profit provided the average loss per insured does not exceed its actuarial value (\$50).¹⁶

A. Reasons Businesses Insure.

It may be easy to understand the reasons an individual or small business purchases liability insurance; however, it is less clear to understand why a large corporation purchases liability insurance. Many large corporations have greater resources than many insurance companies. These companies are in a position to take advantage of the actuarial values exploited by insurance

companies.¹⁷ Instead of purchasing insurance, such businesses could self-insure by setting aside a sum predicted to be adequate to cover their expected losses in any year.

Although large corporations have the tremendous resources to absorb most losses, their resources are exhaustible. Despite the apparent advantage that accompanies large resources, many of these companies purchase liability insurance to satisfy the demands of interested parties, such as, shareholders or lenders.¹⁸ Also, large corporations are encouraged to purchase liability insurance because the premium is deductible, for federal income tax purposes, in the year when it is paid.¹⁹ Further, government contractors may pass the cost of liability insurance to the government as an allowable cost.²⁰ On the other hand, the self-insured individual or business, if it deposits self-insurance "premiums" in a separate account is entitled to a deduction (for the amount of the loss) only in the year when a loss is incurred.²¹

B. Alternative Risk Financing.

Other than purchasing liability insurance on the commercial market, a business or individual can spread the risk of liability by the formation of "captive" insurance companies and forming "risk-retention" groups. A captive is a method for spreading a risk. This method has both the characteristics of self-insurance and purchased conventional insurance.²² There are two kinds of

captives insurance companies, "pure" and "group". A pure captive is owned by a corporate parent and usually insures only the insurer itself, although it may also insure other policyholders.²³ On the other hand, a group captive is owned by and insures several businesses. There are some in the insurance industry who argue that captive insurance coverage can add up to no insurance coverage.²⁴ However, captives have very useful functions. They return profits to their owner/insured, whereas commercial insurance returns the profits to the shareholders of a stock insurance company or the policy holders of a mutual company.²⁵ These profits are often used to reduce the cost of insurance to the company participating in the captive.²⁶ Also, captives allow the insured to purchase reinsurance which will satisfy the demands of shareholders and creditors.²⁷ Captives also have the advantage of organizing under the laws of foreign nations whose regulatory requirements are less stringent than those in the United States.²⁸ Captives, however, generally lack the federal tax advantages provided by the purchase of commercial insurance. Whether the arrangement of coverage is commercial insurance, or an alternative risk spreading method, the arrangement is designed to spread or transfer the risk of liability.

C. The Layers of Insurance.

Primary insurance coverage is insurance where liability,

according to the terms of the policy, attaches immediately upon the happening of an occurrence which gives rise to liability.²⁹ In other words, liability is contingent upon an event that does not include the exhaustion of a predetermined amount of primary insurance.³⁰ On the other hand, "excess" or secondary coverage is coverage where liability, according to the terms of the policy, attaches when a predetermined amount of primary coverage has been exhausted.³¹

1. Excess Insurance.

A corporation that handles hazardous material faces significant exposure to various liabilities. For example, in order to balance risks associated with hazardous materials, a corporation may believe it needs \$100 million dollars of insurance protection. The cost for purchasing such a policy as the primary insurance policy may be far too expensive. In these situations a corporation will structure its insurance program so that several insurers will directly assume a part of the risk in layers above its primary insurance.³² Insurance that assumes a part of the risk above the primary insurance, or first layer, which is issued directly to the corporation policy holder, is excess insurance.³³ Excess insurance can be layered on top of primary insurance or lower level excess insurance. Consequently, the corporation that needs \$100 million may be issued a primary policy with a \$4 million limit. On top of the primary layer

various layers of excess policies will be issued to cover the same risk. The insurers may issue a \$4 million second layer and a \$3 million third layer until the \$100 million limit is reached.³⁴

Excess insurance is less expensive than primary insurance.³⁵ Generally, the higher the layer of excess insurance the lower the amount of coverage per dollar spent because excess insurers may be initially shielded from a loss by the primary insurer or the lower level insurer.³⁶ The actuarial value or risk of loss becomes more favorable the higher the level of excess insurance. Consequentially, the insurer can afford to sell the coverage for less than the lower level or primary insurers.

Excess insurance policies can be written in any way the contracting parties desire; however, standard forms are often used.³⁷ The "following form" excess insurance policy, which is the standard form most commonly used, binds the excess insurer to the terms, conditions, and exclusions of an underlying policy.³⁸ The form will bind the excess insurer to investigate a case or defend the insured unless the form clearly states that the insurer and the insured agree that the insurer shall not be required to defend any claim.³⁹ Often a "following form" excess insurer may be bound by the intent, rather than the strict language of the underlying policy.⁴⁰

The "following form" excess insurance policy may cause complications when there are multi-layers of excess insurance. In this situation one of the various lower levels of excess

insurance may have different wording than the underlying primary policy. Consequently, the insured may believe that coverage is provided for risks that are not covered by an excess insurer. Often this confusion leads to endless litigation. For instance in *Hatco Corp. v. W.R. Grace & Co.*,⁴¹ an excess policy had a pollution exclusion provision and an owned property exclusion, but the underlying policy did not include that language. In this case the New Jersey District Court looked at the language of the excess policy and found it ambiguous. For this reason the Court ruled that the drafter of the provision, the excess insurer, lost the benefit of the provision.⁴²

2. Exhaustion of Underlying Limits.

The language of an excess policy requires the exhaustion of an underlying insurance policy before providing coverage.⁴³ The language of the excess policy usually will determine whether an underlying policy is exhausted. In some instances the underlying limits may be exhausted by the underlying policy paying claims up to the underlying policy limits within specific blocks of time.⁴⁴ This is vertical exhaustion.⁴⁵ Typically, vertical exhaustion allows the insured to chose a specific policy period and apply a claim up from the primary insurer through the layers of excess insurers who provided coverage for that time period.⁴⁶ If there is a multi-year occurrence that triggers more than one occurrence, then the excess insurer must seek contribution from

the other insurers of that time period.⁴⁷ On the other hand, horizontal exhaustion provides that all underlying policies triggered by a multi-year occurrence exhaust before the next layer of excess insurance is liable.⁴⁸

Another issue that is akin to exhaustion is the concept of "drop down". An excess insurer may be required to drop down to cover the losses left by an underlying insolvent carrier.⁴⁹ Whether an excess insurer "drops down" to provide insurance when the primary insurer has become insolvent is a troubling issue for both insured and insurers.⁵⁰ The majority of courts have determined that the excess insurer is not obligated to drop down and step into the shoes of the insolvent primary insurer.⁵¹ However, a number of courts have determined that excess insurers are required to drop down and provide coverage to the insured when the primary insurer becomes insolvent. The court's determination is often based on the interpretation of the language of the insurance policies.⁵²

When the language in the excess insurance policy is ambiguous, courts may require the excess insurer to drop down.⁵³ For example, where an insurance policy uses language requiring that the excess policy provide coverage for losses in excess of "collectable" amounts or "the amount recoverable under the underlying insurance", the excess insurer has been required to drop down because the court determined the language ambiguous.⁵⁴ However, some courts hold that no drop down is required unless the policy clearly states a duty to drop down. The courts have

held that the insured must show more than merely ambiguous language: "There is no indication that the insolvency of Mission was one of the risks considered in determining Federal's premium.... In the absence of clear language imposing on Federal the risk of Mission's insolvency, we decline to create any 'drop down' obligation for Federal." ⁵⁵

Generally, the courts have not required an excess insurer to drop down to cover an insolvent insurer when the policy is clear and unambiguous. For example, where the limits-of-liability clause explicitly limits coverage to the amount in excess of "the amounts specified in the underlying insurance policies"; or the amounts in excess of "applicable limits" the excess insurer has not been required to drop down.⁵⁶

3. Reinsurance.

There is often confusion between excess insurance and reinsurance. As discussed above, excess insurance is between the corporation and the insurer. Reinsurance is a contract between insurers.⁵⁷ This contract shifts the risk of loss from an insurer which originally underwrites a risk to another insurer.⁵⁸ Reinsurance enables an insurer to accept risks that would otherwise exceed its underwriting capacity.⁵⁹ The insurer which transfers the risk, the ceding insurer, can "lay-off" the risk on the reinsurer.⁶⁰

There are two basic types of reinsurance, assumption reinsurance and indemnity reinsurance.⁶¹ Under assumption reinsurance, the reinsurer steps into the shoes of the ceding company and assumes all its liabilities and responsibilities to maintain the necessary reserves against potential claims.⁶² Also, the assumption reinsurer is directly liable to the holders of the policies it has reinsured.⁶³ Under indemnity reinsurance the indemnity reinsurer contracts to indemnify, or reimburse, the ceding company for a specified percentage of the claims and expenses attributable to the risks that have been reinsured.⁶⁴ An indemnity reinsurance agreement does not obligate the reinsurer until the ceding insurer has actually paid the claim.⁶⁵

D. The Problems of Underwriting.

Underwriting is required to provide insurance coverage. In order to provide insurance coverage an insurance company places its assets at risk. Therefore, the insurer must firmly understand the liability involved and be able to effectively evaluate or predict how often liability will occur as well as the size of liability should it occur.⁶⁶ This may very well be the backbone of the insurance company because it may risk the financial security of the entire company.⁶⁷

Hazardous material liability is extremely difficult to underwrite because the magnitude of the problems are often unknown. The liability system for hazardous materials remains

undefined and it continues to fluctuate.⁶⁸ Underwriters must somehow factor three formless factors into their equations.⁶⁹ They must factor the continuing development of the state of scientific knowledge, the possibility that juries may award tort verdicts based on what is either minority or "junk scientific" evidence, and how one accomplishes clean-up.⁷⁰

The scientists and the courts continue to wrestle with the problems of harmfulness and causation of hazardous material liability.⁷¹ This has a major impact on underwriters because the area is unsettled. To further complicate matters, the validity of the science involved may have little impact on underwriters providing coverage for hazardous material liability. Today, since the *Frye*⁷² case was overruled,⁷³ the threat has increased that leading edge science, as well as, "junk science" will be used to persuade juries.⁷⁴

Also, the underwriter may be liable if there is no state-of-the-art defense available.⁷⁵ In this case, the underwriter is liable, if after the policy is underwritten, technology impacting on hazardous material liability changes to the detriment of the underwriter.⁷⁶ This is a harsh result since it is unlikely that an underwriter will ever have reliable information about the ability of science to discover the impact of known or unknown hazardous material in the future.

Since environmental technology is constantly changing, the cleanup standards also change. This is commonly called the "how clean is clean" issue.⁷⁷ As technology improves, the debate is

renewed and new factors are considered. Consequently, relying on the state of science does not provide the firm foundation that is required to accurately underwrite these insurance policies.

The insurance industry can not afford poor underwriting practices. If an insurer wants to underwrite a pollution liability policy, a specialized method must be used.⁷⁸ The insurance industry has realized this and some insurers now treat environmental liability insurance as a specialized field.⁷⁹ Some of these underwriters provide environmental insurance services that combine underwriting, administration, claims, and loss control skills.⁸⁰ To help evaluate the risk of loss for providing environmental insurance these underwriters will conduct an environmental risk assessment or audit. Usually, these audits include: (1) a site survey or inspection of the facility; (2) a survey of the surrounding land use to identify all site sources of contamination; (3) an assessment of the environment setting; and (4) a regulatory review of the current and past practices.⁸¹ Even with this risk assessment the changes of the courts and technology make underwriting hazardous material liability extremely difficult.

E. The Problem of Insurer Insolvency.

Poor underwriting practices may lead to insurer insolvency. There were serious insolvency problems in the property/casualty industry from 1983 through 1989.⁸² During this time about 105

multistate property/casualty insurers became insolvent.⁸³ The losses from these failures exceeded \$5 billion.⁸⁴ The number of insurers that became insolvent annually in the 1980's tripled the average annual rate in the 1970's.⁸⁵

Although the solvency of insurers is currently regulated by state law, the National Association of Insurance Commissioners recommended over four hundred more property/casualty insurers receive closer regulatory scrutiny.⁸⁶ According to the General Accounting Office (GAO), insurance industry officials indicated that the following contributed to property/casualty insurer failures: underpricing premiums, underreserving for losses, problems with risk-sharing arrangements, fraud or incompetence, and overexpansion.⁸⁷ Major insurance companies, such as, Mission Companies, Executive Life, Mutual Benefit Life, Integrity, First Capital Life, Transit Casualty and Monarch Financial have recently had insolvency problems.⁸⁸ The Mutual Benefit insolvency of 1991 involved liabilities of about \$11 billion.⁸⁹

F. The Impact of the London Market.

The solvency of the Foreign insurance market often has a direct impact on our insurance market. Traditionally the London Market plays an important role in the American insurance industry. Many London insurers had solvency problems from the late 1980s to the early 1990s. Recently, even Lloyds of London has been viewed with skepticism.⁹⁰ Since London Market insurers

often reinsure American insurance companies it will be helpful to understand how this market works.

The London Market consists of insurance companies (sometimes called "fringe market") and insurance syndicates.⁹¹ The insurance syndicates are located in Lloyd's building in London.⁹² Inside Lloyd's, the syndicates are comprised of a group of wealthy individuals, known as "names," who pledge all their personal assets to secure their obligations on policies issued by that syndicate.⁹³ Once an individual is accepted as a "name," the individual must post a security deposit equal to 30% of the premium he or she intends to write.⁹⁴ The "names" are actual "underwriters," however, they do not actively underwrite insurance.⁹⁵ Instead, all of the syndicates at Lloyd's use professional underwriters located within the building. Since Lloyd's is comprised of a group of individuals it has considerable flexibility to quickly react to changing market conditions.⁹⁶

Notwithstanding these characteristics, recently Lloyd's suffered an unprecedented series of losses on traditional catastrophe insurance.⁹⁷ These losses are known as the "LMX (London Market Excess) Spiral".⁹⁸ The LMX Spiral involved a complex ring in which reinsurers at Lloyd's transferred all or part of an insured risk from one Lloyd's reinsurer to another. The act of transferring the risk from one reinsurer to another continued until the risk was "packaged" in an unrecognizable form and transferred back to the original reinsurer.⁹⁹ In other

words, the risk of loss would simply "spiral" or circle the involved LMX syndicates back to the original reinsurer.

The syndicates adopted this practice during the 1980's, because each transfer involved a substantially profitable premium.¹⁰⁰ These profits continued until claims were made on the policies. When claims were made each individual reinsurer often found itself liable for the original risk of loss.¹⁰¹

In recent years the world has seen many catastrophes which have resulted in large claims on the LMX.¹⁰² In the United States, catastrophes such as hurricanes, the Exxon Valdez spill, the San Francisco earthquake and the Southern California earthquake of 1994 only add to the problem. The total cost of the spiral is still unknown because Lloyd's uses a delayed three year accounting system.¹⁰³

Nevertheless, Lloyds posted losses of \$8.19 billion over the past three years.¹⁰⁴ These losses are likely to increase in 1991, 1992, 1993 and 1994. Although these losses are significant, Lloyds still claims about \$6 billion in the form of member deposits and the Central Fund, as well as, \$9 billion in the Lloyd's American Trust Fund.¹⁰⁵ Lloyd's claims their aggregate resources amount to \$36.97 billion.¹⁰⁶

The impact of insurance insolvency has a domino impact on the insurance industry.¹⁰⁷ In the area of reinsurance and excess insurance, the insolvency of a larger insurer will roll down on any insurer that has layed off a portion or all of a risk with the larger insurer. Also, in the United States, through state

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insurance guaranty funds, solvent insurance companies become partially responsible for the policyholder obligations of the insolvent insurance companies.¹⁰⁸ State insurance guaranty funds are generally supported by contributions from the insurance industry.¹⁰⁹ If an insurance company goes into liquidation, the remaining solvent insurance companies absorb the losses. Consequently, the well managed insurance company pays for the losses of the poorly managed insurance company.¹¹⁰ Although this seems to punish the well managed insurance company, the insurance industry lobbied for state guaranty laws in lieu of federal regulation.¹¹¹

III. Insurance Policies.

The structure of liability insurance policies determines the scope and conditions of coverage. There are circumstances where almost any liability insurance policy could provide coverage for environmental harm. For example fuel spilled during an auto accident may drain into a nearby stream or river. Consequently the environmental damage may be covered by the terms of the auto insurance.

Generally, three kinds of insurance policies have figured prominently in litigation involving environmental liabilities. These policies are the Commercial Property Insurance policy, the EIL (Environmental Impairment Liability) and the CGL (formerly the Comprehensive General Liability and now the Commercial

General Liability).¹¹² The Commercial Property Insurance policy covers the insured against loss to the insured's own property, therefore, it is considered a "first party" policy.¹¹³ The EIL and the CGL are "third-party" policies, because they cover the insured against liability to a third party.

Coverage for liability insurance policies are triggered either by a claim or an occurrence.¹¹⁴ An occurrence policy provides coverage for injury or damage that occurred during the policy period.¹¹⁵ In this type of policy the coverage is not contingent on the time of the claim.¹¹⁶ In other words, a claim for coverage may be valid years after the occurrence of the environmental liability. Consequently, a tremendous amount of environmental liability insurance litigation is now proceeding many years after the liability occurred.¹¹⁷ On the other hand, the policy triggered by a claim has a definite window of coverage. In this type of policy coverage is provided only if a claim is filed during the policy period.¹¹⁸

A. Insurance Policy Interpretation.

Insurance policies are generally interpreted by the same principles that govern the interpretation of all contracts. If the language of the policy is clear, then the plain meaning of an insurance policy should be enforced.¹¹⁹ If the policy language is ambiguous, then the maxim contra proferentum is applied.¹²⁰

Contra proferentum requires interpreting ambiguities against its

drafter. Only, in rare cases will the insured draft the policy.¹²¹ If the insured and the insurer jointly draft a non-standard policy provision, then contra proferentum probably is not applicable.¹²² Usually the insurer drafts the insurance policy.¹²³

The risk of ambiguity is usually imposed on the insurer as the drafter of the policy. An insurer has several options to minimize the risk that ambiguous terms will be construed against it.

These include: (1) selecting a very precise term that is susceptible of only one reasonable interpretation; (2) carefully placing the potentially ambiguous term in a context that clearly conveys its intended meaning; or (3) expressly defining the term somewhere in the policy. But if the insurer elects to forgo these prophylactic measures (or some combination thereof) and intentionally or inadvertently chooses vague language, it must be prepared to assume the risk that the courts will afford coverage in some situations in which the insurer did not intend to provide it.¹²⁴

The maxim, however, does not simply relinquish the interpretation of the ambiguous term to the whim of the insured. Arguably any unambiguous term may be susceptible to more than one meaning. The courts generally will interpret the provision in a manner that favors coverage only if the provision may be interpreted in at least two different ways and both of those interpretations are objectively reasonable.¹²⁵

Also, the courts may rule in favor of the reasonable expectation of the insured despite conflicting language in the insurance provision.¹²⁶ The expectation of coverage must be "objectively" reasonable to override the clear/unambiguous

language.¹²⁷ This principle is often used to protect the insured from deceptive coverage limitations.

The usage of the reasonable expectation principle is increasing. For example, it is now used to assist in the interpretation of an ambiguous term.¹²⁸ Here the expectation principle is employed to strengthen the maxim contra proferentum. In other words, in case of an ambiguous provision drafted by the insurer, the court may rely on contra proferentum, interpret the provision in favor of the insured, and supplement the ruling by adding that the insured reasonably expected coverage.¹²⁹

The courts follow the standard rules of contract interpretation when interpreting insurance policies. Generally, extrinsic evidence is inadmissible to prove the construction of a unambiguous provision.¹³⁰ However, extrinsic evidence is admissible to prove a provision ambiguous.¹³¹ In order to clarify a contractual ambiguity the courts use extrinsic evidence in the following order. First the court looks to the actual performance of the parties.¹³² If the actual performance does not resolve the issue, then the courts will look to the past course of dealings of the parties.¹³³ Finally, if the past course of dealings of the parties do not resolve the ambiguity, then the court will look to the common trade usages.¹³⁴

B. The Standardization Process.

When shopping for insurance, the insured will encounter

standardized liability insurance policies. These policies have become standardized either by the operation of law or by insurance industry practices.¹³⁵ Under the operation of law, the terms of the policies are prescribed by statute or the terms are mandated by administrative regulations issued by state Insurance Commissioners.¹³⁶ If the policy is standardized by the industry practices, then the liability insurance policies is standardized by organizations comprised of insurers. For example, the Insurance Services Office (ISO) drafts, promulgates and files policies or separate endorsements to policies on behalf of individual companies for approval by state Insurance Commissioners.¹³⁷ Through standardization the insurance purchaser rarely has to be concerned about varying insurance provisions. Under these circumstances the terms of the coverage is not at issue. Generally, the insured will only have to be concerned with the cost of the policy and the strength of the insurance company.¹³⁸

C. The Insuring Agreement.

The key provision to an insurance policy is the Insuring Agreement. The Insuring Agreement expresses the coverage that the policy provides to the insured. Without the Insuring Agreement there is no coverage and the policy is worthless.¹³⁹ The insurer in the standard form CGL policy promises as follows:

"We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."¹⁴⁰

The first sentences of this provision requires that the insured be "legally obligated" to pay for the liability. The language clearly does not include gratuitous payments. An insured may become "legally obligated" to pay before a suit is initiated against it, pre-suit, or after a suit is initiated against it, post-suit.¹⁴¹ It is clear that if the insured is obligated with a judgment that falls within the provision of the coverage, then the insured has satisfied the "legally obligated" requirement.

D. Applying the "As Damages" Clause to Environmental Statutes.

Applying the "as damages" clause of the CGL insurance policy to environmental cost litigation has been challenging for the courts. It may be the most pressing issue concerning CGL insurance policy litigation. Currently issues involving this clause usually arise under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) Superfund¹⁴² or similar state statutes. In these cases insurers usually argue that the CGL insurance policy did not originally contemplate many of the liabilities that arise under CERCLA.¹⁴³ Insurers also continue to argue the liabilities under these statutory obligations are often equitable and not legal

obligations that the policy is designed to cover.¹⁴⁴ They reason that if the liability is not legally payable "as damages" then there is no coverage for the loss.¹⁴⁵

Potential Responsible Parties (PRPs) of course, contend that the liabilities under CERCLA are simply another form of damages.¹⁴⁶ Until recently court decisions were split on how to approach this problem. The courts did not have a consistent method to resolve whether CERCLA liability constitutes damages as contemplated by the CGL policy. There is a trend to resolve this problem by simply properly applying insurance interpretation principals.

E. The Problem of Legal v. Equitable Damages.

Generally, CERCLA liabilities arises in three different situations: (1) when the insured voluntarily initiates a cleanup; (2) when the insured initiates cleanup in accordance with a consent decree or administrative order;¹⁴⁷ or (3) when the insured is liable for cleanup costs incurred by a third party.¹⁴⁸ The cleanup costs incurred by a third party closely resemble classic tort damages. Adhering to judicial injunction and administrative orders seem to fall outside the realm of classic tort damages. Insurers have argued that CERCLA administrative cleanup orders and judicial injunctions are equivalent to equitable relief under section 106¹⁴⁹ and that cost recovery liability is equivalent to the equitable remedy of restitution under section 107.¹⁵⁰

Insurers also argue that recovery or voluntary cleanup costs are equivalent to a request for equitable relief.

The courts have been split on the issue of whether CERCLA remedies are legal or equitable.¹⁵¹ However, this does not seem to be the critical issue that must be resolved. The pivotal issue is whether a remedy is payable "as damages."

In order to resolve whether a remedy is payable "as damages" the clause must be defined. It seems that the body of the policy should be consulted for a definition. However, the standard CGL policy does not define this clause. If clarification can not be found within the body of the policy then state law can be consulted for a definition. In the absence of state law one must determine whether the meaning of the clause is unambiguous.

Traditionally, insurers argue that the term is unambiguous and should be given its legal, technical meaning.¹⁵² On the other hand, the insureds have argued that the term is ambiguous and should be given its plain and ordinary meaning.¹⁵³ To a layperson the plain and ordinary meaning of the term "damages" includes both legal and equitable relief. When insurers have prevailed they relied on *Continental Ins. Cos. v. Northeastern Pharmaceutical and Chemical Co.*,¹⁵⁴ (NEPACCO) and its progeny to find the term "damages" meant only "legal damages". This narrow interpretation of the term results in the exclusion of several CERCLA remedies from CGL coverage.

However, NEPACCO, a Missouri case, has been sharply limited and criticized recently. The court in NEPACCO determined that

under Missouri law, as in most states, the language of an insurance policy is to be given "the meaning that would ordinarily be understood by the lay [person] who bought and paid for the policy."¹⁵⁵ The *NEPACCO* court also found that under Missouri law, if the language is unambiguous, the insurance policy is to be enforced strictly in accordance with its plain and ordinary meaning.¹⁵⁶ On the other hand, if the language is ambiguous, that is, if the insurance policy is reasonably open to more than one construction, then it should be construed against the insurer.¹⁵⁷

Although the *NEPACCO* court conceded that "damages" is an ambiguous term from the viewpoint of the lay person, it found that "in the insurance context,... the term 'damages' is not ambiguous, and the plain meaning of the term 'damages' as used in the insurance context refers to legal damages and does not include equitable monetary relief."¹⁵⁸ The court in *NEPACCO* failed to apply Missouri insurance law principles. Instead of relying on the common meaning of the word "damages" the court proceeded to analyze how the term is used "by astute insurance specialist or perspicacious counsel".¹⁵⁹ The court found that the term should be given its legal, technical meaning. This reasoning led the court to conclude that "damages" unambiguously refers to compensatory or legal relief but does not include equitable monetary relief.

In *New Castle County v. Hartford Acc. and Indem. Co.*,¹⁶⁰ the court used the *NEPACCO* case and its progeny to reinforce, rather

than undermine, its holding that an insurance contract is bound by the popular, lay meaning of its terms. In *New Castle County*, the court pointed out that the *NEPACCO* court overtly conceded that "from the view point of the lay insured, the term 'damages' could reasonably include all monetary claims, whether such claims are described as damages, expenses, costs or losses." ¹⁶¹ Here, the *New Castle County* court used *NEPACCO* to support a finding that "damages" should be broadly interpreted to include legal and equitable liabilities. ¹⁶²

Recently, the courts have found no reason to differentiate between the types of environmental response costs incurred. The D.C. Court of Appeals refused to follow the 8th Circuit's decision in *NEPACCO* stating in pertinent part that:

Our research reveals that, with the exception of *NEPACCO*, in every case in which the operative state's rules of insurance contract interpretation required-as Missouri's does-resort to the common and ordinary understanding of language, the word "damages" has been construed to cover reimbursement for environmental response costs insured by a government.... Decisions construing the term differently were apparently governed by state rules of interpretation under which the technical or legal meanings of language controlled. ¹⁶³

In *Potomac Elec. Power v. California Union Ins.*, ¹⁶⁴ the court found that to distinguish between legal and equitable remedies makes little sense in the context of environmental response costs. ¹⁶⁵ The court went on to state "Although suits for environmental response costs are traditionally considered equitable because they seek restoration or restitution for damages to property, they are still fundamentally concerned with

damage to property."¹⁶⁶ The court found the term was not defined in the policy and it rejected the insurers argument that the term damages should have a "narrow, technical definition." Instead it held: (1) "principals of insurance contract interpretation require that the terms of an insurance policy be construed according to 'the understanding of the ordinary person, that is, to say they will be given the meaning that common speech imparts'";¹⁶⁷ and (2) that both legal and equitable remedies are covered by the term "damages."¹⁶⁸

In ascribing to the term "damages" its plain and ordinary meaning these courts have found that the term encompasses cleanup costs legally imposed by the government as reimbursement for activities in remedying environmental harm. In other words, these cases may represent the beginning of a new trend in which the courts will consistently find that it is reasonable for the insured to interpret the term "damages" to include legal and equitable environmental cleanup costs.

IV. Recent Antitrust Concerns.

Recently the insurance industry's practices concerning the creation the environmental liability provisions of the CGL policy was reviewed by the United States Supreme Court. In *Hartford Fire Ins. CO. v. California*,¹⁶⁹ nineteen States and many private plaintiffs filed complaints against four domestic primary insurers, domestic reinsures to the domestic primary insurers, a

domestic reinsurance broker, and reinsurers based in the London market.

The plaintiffs in this case alleged that the defendants violated the antitrust provisions of the Sherman Act.¹⁷⁰ Allegedly, the defendants engaged in a conspiracy designed to force other primary insurers in the United States to change the terms of their standard domestic CGL insurance policy. The defendants allegedly caused other primary insurers throughout the United States to conform with their policies.

The case involved the language of the two 1984 CGL forms, the "claims-made" form and the "occurrence" based form. The 1984 CGL occurrence form indicated the CGL policy would be sold on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident or 'injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." In place of this traditional "occurrence trigger of coverage, the defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. This represents a significant change in the terms of the policy because it gives the insurer a distinct advantage. Such a policy only obligates the insurer for claims having been made during the policy period. When the policy period ends without a claim having been made, the insurer will not be exposed to further liability.

Also, the defendant insurers allegedly wanted the "claims-

made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. This new provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume in liability arising from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm.

Allegedly the defendants also wanted to eliminate the "sudden and accidental" pollution coverage that is traditionally included in the CGL insurance policy. Finally the new CGL form would eliminate the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage. Under the new CGL form the legal defense costs would be counted against the stated insurance policy limits and provide for a "legal defense cost cap".

To bring about the change in the 1984 CGL forms the defendants took a series of steps that allegedly violated § 1 of the Sherman Act.¹⁷¹ The plaintiffs charged that Hartford Fire Ins. Co., a primary insurer, persuaded the General Reinsurance Corporation (General Re), the largest American reinsurer, to take steps to either change the CGL form as mentioned above or "derail" the entire ISO CGL forms program if the new CGL form is not accepted. Allegedly, General Re persuaded Reinsurance Association of America (RAA), a domestic reinsurer trade association. Then RAA created a special committee that met and agreed to "boycott" the 1984 ISO CGL forms unless a retroactive-

date provision was added to the claims-made form, and a pollution exclusion and defense cost cap were added to both forms.

Next, allegedly, RAA informed ISO that its members would not provide reinsurance for coverage written on the 1984 CGL forms. Meanwhile Hartford and General Re persuaded a domestic reinsurance broker to give a speech to the ISO Board of Directors. During this speech the domestic reinsurance broker stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL form.

The four primary insurer defendants allegedly persuaded important players in the London reinsurance market to withhold reinsurance for coverage written on the 1984 ISO CGL forms. As mentioned above, London reinsurers have traditionally played a significant role in the North American reinsurance market. Consequently, many London-based underwriters, syndicates, brokers, and reinsurance companies told ISO of their intention to withhold reinsurance on the 1984 forms.

Shortly thereafter, ISO held an unprecedented meeting of domestic and foreign reinsurance representatives. At this meeting the reinsurance representatives presented a united front. They indicated that the CGL forms would be changed or there would be no reinsurance. Consequently, ISO changed the CGL form. The ISO Executive Committee voted to include a retroactive-date provision in the claims-made form, and to totally exclude all pollution coverage. The occurrence based form was not eliminated and the legal defense cost cap was not added.

After this unprecedented meeting the 1984 forms were eliminated from the insurance market place and replaced with the 1986 forms. The 1986 forms, containing the changes mentioned above, replaced the 1984 CGL form and made it impossible for other ISO members to use the 1973 CGL form.

The main issue the Court addressed was whether the alleged activities of the domestic defendants, acting together with the foreign defendants violated the antitrust provisions of the Sherman Act. To decide this issue the Court reviewed the interaction of two important pieces of economic legislation. Reviewing this issue the Court stated:

The Sherman Act declares "[e]very contract, combination in form of trust or otherwise, or conspiracy, in restraint to trade or commerce among the several States, or with foreign nations, ... to be illegal." 14 U.S.C. § 1. The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, 15 U.S.C. § 1012(a), and (again, generally) that "[n]o Act of congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance." § 1012(b). Section 2(b) of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act applies "to the business of insurance to the extent that such business is not regulated by State law," § 1012(b), and § 3(b) provides that nothing in the McCarran-Ferguson Act "shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." § 1013(b).¹⁷²

The Court determined that the antitrust exemption of § 2(b) of the McCarran-Ferguson Act¹⁷³ applies to "the business of insurance" to the extent that such business is regulated by state law. In other words, the exemption applied to "[m]ercantile transactions, buying and selling; [and] traffic." This

antitrust exemption does not refer to a single entity or company.

In order to determine whether the antitrust exemption of § 2(b) applies the Court looks to whether a particular practice is part of "the business of insurance" and exempted from the antitrust laws by § 2(b). Here, the Court considers three factors: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. If the three factors are present, then the action qualifies as "the business of insurance." If "the business of insurance" is not regulated by State law then it falls within the realm of the antitrust regulations of the Sherman Act. If "the business of insurance" is regulated by State law then it is exempted from the Sherman Act under this section.

The Court of Appeals in this case did not use this line of reasoning. The Court of Appeals' rationale rested on whether the entity or company, not the practice, was regulated by State law. Therefore, the Court found that it was error for the Court of Appeals "to hold the domestic insurers bereft of their McCarran-Ferguson Act exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument, were 'not regulated by State law.'" The Court expressed no opinion on whether the activities of the domestic reinsurers or the activities of the foreign reinsurers were "regulated by State

law." This question was remanded to the Court of Appeals.

Even the participation of foreign reinsurers, did not affect the § 2(b) exemption, the Court of Appeals held, "the agreements and acts alleged by the plaintiffs constitute 'agreement[s] to boycott' and 'act[s] of boycott [and] coercion' within the meaning of § 3(b) of the McCarran-Ferguson Act, which makes it clear that the Sherman Act applies to such agreements and acts regardless of the § 2(b) exemption."¹⁷⁴

On this point the Court agreed with the Court of Appeals' conclusion that the complaints were sufficient to survive a motion to dismiss. However, the Court disagreed with the Court of Appeals' overly narrow definition of the term "boycott" as used in § 3(b). The Court of Appeals limited the term "boycott" as those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. In applying this definition the Court of Appeals concluded that the reinsurers role in the course of action could never constitute a § 3(b) boycott so long as the reinsurer's role was limited to "a concerted agreement to seek particular terms in particular transactions".

The Court found that the term "boycott" as used in § 3(b) refers to a combination to refuse to engage in some, but not necessarily all, transactions with insurers designed to punish an insurer for a position taken or to coerce an insurer to abandon its position. Although the Court did not specifically define the term "boycott", the Court clearly asserted that the Court of

Appeals' definition was too narrow. Also, the Court found that the Court of Appeals' rationale was fundamentally flawed because narrow the definition was not properly applied to the facts in this case. In other words, the Court found that a proper application of the Court of Appeals narrow definition to the facts in this case precluded the Court of Appeals' rationale. Finally, on this issue, the Court found the narrow definition "may slowly plug what remains of the § 3(b) exception." The case was affirmed in part, reversed in part, and remanded in part for further proceedings consistent with the opinion.

Although the *Hartford Fire Ins. Co.*¹⁷⁵ case does not provide a specific definition of the practices which constitute an antitrust violation in the business of insurance, it provides a foundation to understand the relationship between the Sherman Act and the McCarran-Ferguson Act. It provides a glimpse of the factors the Supreme Court may consider if this case eventually, or a similar case, is decided at that level. Furthermore, this case shows the efforts the insurance industry is taking to escape environmental cost liability under the CGL policy. Was the 1986 CGL form, which is currently being used, improperly forced on the American insurance marketplace? If this is true then what will become of the environmental liability insurers are avoiding as a result of the elimination of the 1973 and 1984 CGL forms?

V. Theories of Environmental Liabilities.

Environmental liability comes in a variety of ways. For instance, environmental liability may result from exposure to harmful substances. These harmful substances are regulated and are often considered hazardous materials. The bulk of litigation in the insurance industry centers around the liability for the cleanup of these materials. The theory of liability is often the cornerstone of determining who is ultimately liable for the cost of cleanup. Liability may be found under traditional common law tort theories such as negligence or intent. Today, however, many cases of environmental liability are based on strict liability theories.

Strict liability theories are employed under statutory liability for cleanup costs. This is the reason federal and state programs governing the treatment, storage, disposal, and cleanup of hazardous substances have come to the forefront of environmental liability law. The two biggest statutory programs are the Resource Conservation and Recovery Act of 1976, or "RCRA",¹⁷⁶ and CERCLA and often called the "Superfund" Act.¹⁷⁷

A. RCRA.

The 1976 enactment of RCRA established a comprehensive regulatory scheme for hazardous waste. The regulatory scheme created a "cradle to grave" system for governing the generation, transport, storage, treatment, and disposal of hazardous waste. In other words, the main purpose of RCRA is to regulate the

disposal, storage and treatment of waste currently being generated.¹⁷⁹ In order to achieve this purpose, administrative and injunctive remedies are available to the government.¹⁸⁰ Also, the government is authorized to seek "corrective action" of hazardous waste at any facility operating under a RCRA permit or seeking a RCRA permit.¹⁸¹

There are serious consequences for not complying with the injunctive and administrative orders. First, compliance with the RCRA corrective action provisions are required in order to obtain or retain a RCRA permit.¹⁸² If there is no compliance, then there will be no permit. Second, failure to comply with an administrative or an injunctive order may subject the violator to substantial fines and penalties. The fines can become overbearing for they can reach \$25,000 per day per violation.¹⁸³

B. CERCLA.

The main purpose of CERCLA is to remove dangers posed by past deposits of hazardous waste. This purpose is initiated by the development of the National Priority List ("NPL") of sites around the country that pose the greatest danger to health or the environment.¹⁸⁴ Currently, there are over 1200 sites and the number of sites is projected to reach about 2,100 in the year 2000.¹⁸⁵ The GAO said there were from 130,000 to 425,000 sites that would need to be evaluated for Superfund eligibility.¹⁸⁶ CERCLA was amended by the Superfund Amendments and

Reauthorization Act of 1986 ("SARA") to strengthen the government's authority to deal effectively with the problems of the release of hazardous substances, pollutants and contaminants into the environment.¹⁸⁷

CERCLA authorizes the government, through the Environmental Protection agency (EPA), to take various actions to achieve the purpose of the statute. The EPA may direct "response" actions to abate actual or threatened releases of hazardous materials.¹⁸⁸ Under these circumstances the Hazardous Substance Superfund may initially pay for the federal government's response actions.¹⁸⁹ CERCLA also allows the government to seek injunctive relief from a court or issue administrative orders to abate an "imminent and substantial endangerment" caused by the release of a hazardous substances.¹⁹⁰ Finally, CERCLA authorizes the United States, as well as, a state, or a private party to recover incurred cleanup costs.¹⁹¹

CERCLA section 107 is a powerful enforcement tool. It authorizes the government to seek three times the total cost of cleanup for failure to comply with an administrative order.¹⁹² Also, section 107 of CERCLA imposes strict liability for cleanup costs on three categories of responsible parties: (1) the past and present owners and operators of sites containing hazardous substances; (2) certain parties that transported material to a site; and (3) any party that has generated or arranged for the disposal of material at the site.¹⁹³ An individual that falls into one or more of these categories are known as a potentially

responsible party (PRP).

In addition to strict liability the courts have found that liability under CERCLA is joint and several when the harm is indivisible.¹⁹⁴ The government has found that joint and several liability serves as an effective incentive to enlist private parties in the enforcement process, and encourages responsible parties to work together to negotiate cleanup agreements with the government.¹⁹⁵ In addition to being strict, joint and several, the liability that section 107 imposes on responsible parties may also be retroactive, because it may be imposed for the consequences of actions taken before the enactment of CERCLA and before the capability existed to determine that an action would lead to environmental damage.

Although this statute may seem harsh, the PRP is not left without recourse. There are some defenses available under section 107. The defenses to a section 107 action are limited to situations in which: (1) an act of God or war causes the release of a hazardous substances; (2) the harm is the result of third-party intervention at an otherwise properly operated site; or (3) the harm is the result of a fraudulent misrepresentation about prior disposal of hazardous substances at the site at an otherwise properly operated site.¹⁹⁶

1. CERCLA Contribution.

CERCLA also authorizes a responsible party to seek

contribution for cleanup costs. For instance if the government decides to cleanup a CERCLA site, in the public interest, it may later bring a section 107 action against only one of the responsible parties. In this case, CERCLA section 113 allows for contribution among responsible parties during or after a section 107 or a section 106 (administrative orders and judicial injunctions) action on the basis of equitable factors.¹⁹⁷ In other words, if a party is liable to the government under section 107 or under section 106, that party may bring a section 113 action against the other responsible parties liable for the contaminated site. A contribution action ultimately assures that all viable parties potentially responsible for the site will share the costs of cleanup.¹⁹⁸

2. CERCLA Settlements.

Under the settlements language of CERCLA section 122, the EPA may agree to settlements with PRPs' before actual cleanup.¹⁹⁹ Under these agreements, the PRPs that failed to settle are liable for the difference between the settlement and the actual cleanup cost.²⁰⁰ Therefore, a non-settling party may shoulder a disproportionate burden for failing to take part in the settlement process. The statutory language of section 122 along with the exposure to strict, joint and several liability has made responsible parties cooperate with the government.²⁰¹ This cooperation, however, has not spread to the settlements between

private parties. Usually one of the major reasons for the lack of cooperation between private parties centers around the structure of the liability insurance policy.

VI. Lender Liability.

CERCLA provides that a PRP is exempt from liability provided: (1) the disposal or placement of a hazardous substance occurred before the contaminated property was acquired;²⁰² and (2) it is an innocent land owner.²⁰³ The PRP must show an absence of knowledge and that appropriate measures were taken to inquire into the use of the property by previous owners. CERCLA also provides that a person is not an "owner or operator" of a facility if the person only holds a security interest in the property.²⁰⁴

A person who holds indicia of ownership primarily to protect a security interest in property is not considered an owner or operator provided there is no participation in the management of the property.²⁰⁵ Nevertheless, there have been different interpretations of the meaning of "owner or operator" among the district courts. One of the most prominent cases in this area is *United States v. Fleet Factors Corp.*,²⁰⁶ which held a secured creditor may be liable under CERCLA section 9607(a)(2) without being an operator by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes.²⁰⁷ The court also

found that it is not necessary for the secured creditor to actually involve itself in the day-to-day operations of the facility in order to be liable.²⁰⁸ Consequently, lending institutions were uncertain about what actions would constitute environmental liability. For instance, lenders did not know whether actions such as foreclosure, refinancing and loan workouts would make them liable for cleanup costs.²⁰⁹ Also, the secured creditors did not know whether they had an affirmative duty to monitor a borrower's operation to assure compliance with CERCLA?²¹⁰

The EPA has attempted to clarify the security interest exemption in order to provide guidance on what actions by lenders will make them liable for cleanup costs. The EPA drafted a Final Rule that provides a two-prong test to determine whether secured creditors are participating in management and thereby liable for cleanup costs.²¹¹ Prong one requires that the secured creditor exercise decision making control over the borrowers' environmental compliance program.²¹² In this prong of the management test, the secured creditor must have assumed responsibility for controlling the hazardous waste disposal practices of the borrower.²¹³ Prong two requires that the secured creditor have actually participated in the borrower's daily managerial operations and decisions concerning environmental compliance or other operational aspects of the business.²¹⁴ Together the prongs seem to suggest that the lender have total control of borrowers business in order to establish liability.

Under the Final Rule a secured creditor may attempt to use reasonable influence over the borrower during the existence of a loan arrangement to avoid loan default.²¹⁵

The Final Rule is not a panacea for lenders because it fails to address the right of private parties to bring suit against secured creditors under CERCLA.²¹⁶ It only addresses the relationship between the EPA and secured creditors. Further, it may amount to mere policy because this rule will not stop a third party from suing a lender.²¹⁷ This rule will not stop a third party from seeking contribution from the secured creditor.

Also, EPA failed to address how, if at all, this ruling will impact a secured creditor's liability under RCRA.²¹⁸ For instance, there is no mention of whether the Final Rule will apply to the definition of owner under RCRA. Finally, since the Final Rule appears to be limited to CERCLA, which is federal law, it will not prevent states from passing and enforcing environmental laws for the cleanup of hazardous materials.²¹⁹ Therefore, if the lender falls with the CERCLA exemption as pronounced by the EPA, it may not qualify for exemption under the state laws.²²⁰ Consequently, the lender may be liable for cleanup costs in these situations.²²¹

CERCLA, RCRA and similar state laws cause lenders to face increased risks of losing on their investments. Environmental legislation imposes cleanup costs, fines, and penalties and raises the likelihood that the borrower may default on loans. As these statutes pressure lenders to protect their investments, the

statutes remain unclear on how far a secured creditor can go to protect an investment without becoming liable for cleanup cost. Consequently, lenders may refuse to finance loans to an otherwise qualified business, to include government contractors, if the business uses hazardous materials or is located in an area near hazardous contamination.

The high costs involved may prove that it is in lenders interest to start refusing loans even though these businesses take proper precautions and extensively monitor the disposal of hazardous waste. The Final Rule may help to clarify a standard under CERCLA but lenders will still be cautious in dealing with borrowers who deal with hazardous materials, because it leaves several issues unresolved.

VII. Contractor Liability.

Currently the insurance industry does not consider environmental contamination an insurable risk, at a reasonable cost.²²² The 1986 CGL form includes a pollution exclusion provision and the EIL policy is very expensive.²²³ The exception to this general rule is a sudden accidental contamination, such as an oil tanker spill resulting from a collision. As discussed above contractors can recover environmental costs on policies written before the insurance industry began to exclude environmental coverage. Consequently, many environmental contamination actions involve CGL policies developed before the

current underwriting exclusions.

Superfund cleanup contractors are potentially liable for any property or personal damage caused by their work at a Superfund site. Moving hazardous materials or contaminated soil or water at the site may be viewed as a new disposal of the hazardous material. Consequently, the cleanup contractor can be held liable under CERCLA.²²⁴ If strict liability is applied to Superfund contractors then the contractor could be penalized even though the contractor acted prudently.²²⁵ Strictly enforcing this on cleanup contractors would basically stifle any cleanup effort.

The EPA has the authority to remove the application of strict liability to these contractors under section 119.²²⁶ Also, section 119 authorizes the EPA to indemnify the contractor.²²⁷ This is intended to help to balance the fact that Superfund cleanup contractors have limited opportunities to get insurance. To address the lack of insurance opportunities for cleanup contractors, and to prevent a shortage of qualified firms able to perform hazardous waste cleanup work, the 1986 Superfund Amendments included a contractor indemnification provision.²²⁸ Section 119 directed the EPA to determine whether adequate insurance coverage existed to provide liability protection to a sufficient number of cleanup contractors for work at Superfund sites.²²⁹ The EPA was to provide indemnification to these contractors if necessary insurance was unavailable.²³⁰

In October 1987, the EPA determined that adequate insurance was unavailable.²³¹ Consequently, an interim policy was

established to indemnify contractors for acts of negligence but not for gross negligence or intentional misconduct.²³² Under this interim policy the EPA provided indemnification up to the unobligated balance of the trust fund and established no time limits on the period of indemnification.²³³

The hazardous waste cleanup contractors warmly received this policy. In their view, some form of indemnification was required to ensure their continued participation in the cleanup effort.²³⁴ On the other hand this policy was criticized by GAO in a 1989 study.²³⁵ According to GAO the government was subjecting the trust fund to an unacceptable risk.²³⁶

Congress investigated the matter. During these investigations some witnesses told the Subcommittee that contract bids were significantly raised at Superfund sites where indemnification was not provided by the government.²³⁷ The witnesses claimed the raised bids were required to cover the potential risks associated with the exposure.²³⁸ However, the main issue was whether lack of indemnification impacted significantly on the participation of cleanup contractors in the Superfund program. Congress found this a difficult issue to resolve. Contractors told Subcommittee staff members that qualified cleanup contractors participation in Superfund contracts would be limited without contractor indemnification.²³⁹ Yet GAO maintained that it did not note any adverse impact on contracting where government indemnification was not provided.²⁴⁰ GAO explained that qualified cleanup contractors performed

Superfund cleanup work for states with out securing indemnification.²⁴¹

On January 25, 1993, the EPA issued final indemnification guidance concerning section 119 indemnification.²⁴² This new guidance substantially changed the indemnification relationship between Superfund contractors and the EPA. First, EPA indemnification will generally range from \$2 million to \$50 million.²⁴³ The contractors will pay a heavy deductible ranging from \$20,000 to \$1 million.²⁴⁴ If the EPA contract is to last five years or more, then the EPA may provide up to \$75 million of indemnification with a contractor deductible of \$2 million.²⁴⁵ Also, the guidance requires the contractor to pay dollar-for-dollar co-payment for all claims over \$50 million.²⁴⁶ Under this new guidance the term of the indemnification is limited to ten years.²⁴⁷ The guidance will apply to existing EPA contracts, as well as, new contracts because existing contractors were required to agree to the new indemnification limits or have their contracts terminated.²⁴⁸ Finally, future contractors will not be indemnified by the EPA unless an insufficient number of contractors bid on the contract and lack of indemnification is proven to have caused the lack of bidding interest.²⁴⁹ It remains to be seen whether the EPA's new guidance will have the intended effect of reducing the amount of claims exposure to the federal trust fund without substantially limiting the number of qualified contractors willing to bid on Superfund contracts.

A. Defense Department Reimbursement of Contractors' Environmental Cleanup Costs.

The indemnification of defense contractors is an unresolved issue. Defense contractors are subject to environmental liability just like any other company even though they are performing work for the United States.²⁵⁰ Currently, defense contractors are able to include hazardous waste cleanup costs in contract overhead.²⁵¹ It appears some defense contractors have received fees on these cleanup costs.²⁵² In addition to receiving reimbursements on cleanup costs by including the costs in overhead, some contractors are able to seek reimbursement of cleanup costs under Public Law 85-804.²⁵³

Currently, there is no specific guidance on DOD reimbursement of contractors' environmental cleanup costs.²⁵⁴ Therefore nothing precludes a contractor, if the contract contains cost reimbursement provisions, from treating allowable portions of CERCLA cleanup costs as "ordinary and necessary business overhead" expenses.²⁵⁵

A cost is allowable if each of the following factors is met: (1) reasonableness, (2) allocability, (3) compliance with cost accounting standards, (4) compliance with contract terms, and (5) meeting any other specific FAR limitations.²⁵⁶ Fines and penalties resulting from violations of, or failure of the contractor to comply with Federal, state, or local laws and regulations are unallowable, except when incurred as a result of

contract compliance or written instructions from the contracting officer.²⁵⁷

A contractor may request that the EPA define the scope of CERCLA liability in a consent decree in order to include CERCLA liability under the cost of a contract.²⁵⁸ In this instance the contractor may ask EPA to specifically proclaim that the CERCLA payment "is not a penalty or monetary sanction."²⁵⁹ Since CERCLA liability is based on whether the contractor is an owner, operator, transporter or generator of hazardous waste instead of on a violation of Federal, state, or local law, CERCLA cleanup costs may be allowable even though it is a fine or penalty.²⁶⁰

In the CERCLA arena the reasonableness factor is particularly relevant in the allowability of cleanup costs. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.²⁶¹ Reasonableness may be determined by compliance with federal and state laws and regulations and the contractor's responsibilities to the Government and the public at large.²⁶² Therefore, CERCLA cleanup costs may be reasonable if the contractor investigates and otherwise takes steps to remediate releases of hazardous materials from the contractor's facility.²⁶³ Generally, reasonableness determinations are made on a case-by-case basis and consider any relevant factor concerning the environmental cleanup.²⁶⁴

Currently, Department of Defense (DOD) auditors and

contracting officers are instructed to evaluate environmental cleanup costs just as they evaluate any other type of cost that may be included in a contractor overhead rate proposal, following the current allowability criteria in the FAR.²⁶⁵ DOD has recognized that there are situations involving no contractor malfeasance where equity, and the FAR allowability criteria, may require that the Government should pay its fair share of the cleanup costs.²⁶⁶ Since CERCLA allows the financial responsibility of a contractor under a "no fault" theory, DOD asserts judging each situation on its own merits and utilizing the appropriate FAR cost allowability criteria.²⁶⁷ On May 20, 1993, Sherri Wasserman Goodman, Deputy Under Secretary of Defense for Environmental Security, stated to Congress:

This Administration does not intend to reimburse cleanup costs incurred by contractors that violated specific environmental laws or regulations, nor does it intend to reimburse unreasonable amounts of such costs. The policy question we must all address is what is the government's fair share of cleanup costs when there is no determination of fault. For example, if environmental damage occurred despite the exercise of due care by a contractor which complied with specific laws and regulations and conducted its business in accordance with standard industry practices, if that contractor has spent reasonable amounts in a cost-effective manner to remedy environmental damage, and if that contractor has vigorously sought reimbursement from all available contributory sources, such as insurance carriers, in order to help defray the costs, it may be that the U.S. Government should pay its fair share, but only its fair share, of that contractor's cost.²⁶⁸

Congress has now begun to question DOD's practice of allowing contractors to include cleanup costs in overhead rate proposals. An argument against the current practice asserts that

"we have a contracting system where the American taxpayer ends up footing the bill to cleanup the environmental messes created by the Pentagon's suppliers."²⁶⁹ Congress is concerned about how much environmental cleanup will actually cost the DOD contractor and how much of this bill will be paid by the Pentagon and the taxpayer.²⁷⁰ Congress wants to know whether DOD contractors are making a profit on these costs.²⁷¹ Also, Congress wants to know who in the government is responsible for authorizing cleanup reimbursements and whether DOD has a sound and uniform policy governing the reimbursement of cleanup costs.²⁷²

In response to these issues Congress tasked GAO to study the scope and magnitude of DOD's reimbursement of contractors' environmental cleanup costs. GAO then conducted two studies. Neither study has been completed. In the first study GAO has begun to survey the 15 largest U.S. defense contractors to estimate their cleanup costs.²⁷³ According to GAO, 15 of DOD's largest contractors estimate that their future environmental cleanup costs will total \$2.1 billion.²⁷⁴ This estimate, however, includes costs for both governmental and nongovernment business activities.²⁷⁵ GAO has indicated that much of this cost could be incurred by DOD because current DOD practices allow for the recovery of activities like site investigations, site cleanups, remediation, mitigation of existing damage, capital purchases, and legal counsel.²⁷⁶

In the second study, GAO is surveying the consistency of DOD environmental cleanup cost reimbursement practices.²⁷⁷ In order

to survey these practices GAO has begun to survey the environmental cleanup costs reimbursement practices at DOD's most polluted sites. The study includes information from two Seattle, WA, waste sites used by Boeing Co. where the estimated cleanup cost will run up to \$179 million by the year 2000.²⁷⁸ A Burbank, CA, site where the estimated cleanup cost at a Lockheed Corp. site will exceed \$219 million by the year 2000.²⁷⁹ Finally, the study includes practices from Sacramento, CA, where Aerojet Corp. will incur estimated cleanup costs of \$500 million by the year 2000.²⁸⁰

According to GAO, these four sites indicate that DOD has inadequate regulatory controls of environmental cleanup costs.²⁸¹ The inadequacy of regulatory controls is directly related to the lack of data on environmental cleanup costs.²⁸² Currently DOD does not collect data on environmental cleanup costs.²⁸³ These costs are unknown because they are included in aggregate overhead rates charged by contractors.²⁸⁴ This accounting method prevents DOD from accurately budgeting and planning for environmental cleanup costs.

1. Environmental Cost Allowability Guidance.

The problems with inadequate regulatory controls are seen most vividly in the lack of a specific FAR cost principle addressing environmental cleanup reimbursement. This lack of guidance has led DOD to inconsistent methods when determining

cost allowability and inconsistent treatment of contractor claims for cleanup costs.²⁸⁵ For example, a contracting officer may investigate potential violations of federal or state environmental laws and regulations at one site while contracting officers at other sites do not.²⁸⁶ In another case a contractor may be able to include environmental cleanup costs in their general and administrative accounts, which are not fee bearing, while others may include cleanup costs in accounts which are fee bearing, thus collecting a fee on their reimbursement/indemnification.²⁸⁷

DOD has responded to claims that its inconsistent cost allowability practices were attributable to the lack of specific environmental cost policy guidance. On December 1991, the latest draft of the environmental costs principle was completed by a joint DOD and civilian subcouncil of the FAR Council.²⁸⁸

This subcouncil addressed environmental costs as preventative costs and cleanup costs.²⁸⁹ Generally, the environmental cost principle would allow reimbursement of preventative environmental costs.²⁹⁰ Preventative environmental costs would not be allowable if they result from a violation of law, regulation, or a compliance agreement.²⁹¹ The environmental cost principle specifically does not include any costs resulting from liability to a third party.²⁹² Further, cleanup costs or costs to correct damage would be presumed unallowable, unless the contractor proved that; (1) it performed under a Government contract that contributed to the pollution, (2) it acted

prudently and complied with then-existing environmental laws and regulations, (3) it acted promptly to minimize the damage and costs, and (4) it exhausted or was diligently pursuing such sources as insurance and other responsible parties to defray the cleanup costs.²⁹³ Also, the draft cost principle specifically excludes any cost resulting from a liability to a third party.

This new principle has not been enacted due to a Presidential moratorium on new Federal regulations. It is currently in the public comment phase of the regulatory process. Defense contractors and their representatives have been very critical of the draft principle. They claim it would add too many unfair burdens on contractors seeking reimbursement for environmental cleanup costs.²⁹⁴ On the other hand, many environmental activists object to the draft principle because it allegedly leniently allows for environmental cleanup cost reimbursement.²⁹⁵

2. The Impact of the Draft Environmental Cleanup Cost Principle.

The new cost principle would significantly change the relationship the Government has with contractors. Under the new cost principle the Government would restrict the extent of its liability under environmental laws by imposing a presumption of unallowability for cleanup costs.²⁹⁶ This policy would be inconsistent with the current policy that environmental cleanup

costs meet the general test of allowability.²⁹⁷ Currently, most costs incurred under cleanup cost statutes like CERCLA, RCRA, and others have become generally recognized as "ordinary and necessary" contractor expenses.²⁹⁸ The Government has recognized that most remediation costs arise in the ordinary course of business and are allowable provided the costs do not arise from improper or unlawful conduct which would make the cost unreasonable.²⁹⁹

Generally, commercial companies include all environmental costs in their prices they charge the public.³⁰⁰ Presuming that the environmental cleanup costs of government contractors as presumptively unallowable clearly would preclude them from using a lawful and commonly accepted practice.³⁰¹ Meanwhile other commercial companies would continue to use this practice with other customers. Therefore, those government contractors that compete with other commercial companies would be at a disadvantage by contracting with the government.

The presumption of unallowability changes the current method for determining the allowability of costs. The current method involves the contracting officer first determining whether cost is allowable after reviewing the facts. If the contracting officer determines that the cost is unallowable, then the contractor is required to prove that the cost is reasonable.³⁰² The draft principle would require the contractor to first prove the allowability of environmental cleanup costs without the contracting officer first reviewing the facts and initially

determining whether the costs are unallowable.³⁰³

According to the draft principle, a contractor can overcome the presumption of unallowability provided it demonstrates that it acted prudently, and complied with then-existing environmental laws and regulations, and followed generally accepted industry practices.³⁰⁴ In order to make this determination, the contracting officer will not only be responsible for knowing currently accepted standard industry practices, the contracting officer must also know then-existing environmental laws and regulations and generally accepted industry practices. Consequently, the contracting officer will be forced to interpret federal, state, and local environmental laws. This interpretation is likely to be challenged by the contractor if it results in the exclusion of any of the claimed cleanup costs. Consequently, the boards of contract appeals and the Claims Court will be burdened with cases requiring them to render opinions of environmental laws.

As a practical matter any federal procurement official will be required to thoroughly understand complex environmental statutes and regulations. Notwithstanding, the procurement official's understanding of environmental laws and regulations, if cleanup costs are disallowed for allocation to government contracts then contractors will be forced to turn to the courts for relief. In this regard the presumption of unallowability would frustrate the contracting process if contractors are constantly forced to turn to the courts for relief.

The presumption of unallowability is inconsistent with the liability theories of many environmental statutes. The theory of strict liability is the bases of some important environmental statutes. These statutes impose liability without regard to fault. These statutes were designed to provide an efficient regulatory mechanism for implementing cleanup actions without protracted litigation concerning the relative culpability of the parties involved with the site.³⁰⁵

The draft principle also does not include "any costs resulting from a liability to a third party."³⁰⁶ Paragraph (a) (2) of the draft cost principle expressly excludes a liability to a third party from being treated as any kind of environmental cost.³⁰⁷ Currently, there is no explanation for this exclusion. Did the drafters intend to cover these costs by another FAR provision?

Paragraph (a) (2) of the draft cost principle may adversely impact on the contractors ability to recover environmental costs from insurers. In order to seek reimbursement of environmental cleanup costs under the draft cost principle the contractor would have to admit that the costs do not constitute liabilities to third parties.³⁰⁸ This may have a substantial impact on the relationship contractors have with their insurers because most recoverable environmental cost are considered costs resulting from a liability to a third party.

As discussed above most companies are covered by the EIL or the CGL polices for the recovery of environmental investigation

and remediation costs.³⁰⁹ Generally, these policies only provide coverage for the contractor's liability to a third party for property damage or personal injury.³¹⁰ For CGL purposes the insured's liability to the EPA and other regulators are considered a liability to a third party.³¹¹ Therefore, if the contractor admits that environmental cleanup costs are not liabilities to third parties for government contract reimbursement purposes, then insurance companies will likely argue that these environmental cleanup costs do not constitute liabilities to third parties for CGL insurance policy purposes.³¹² If insurers are successful with this argument, then the contractor would be precluded from recovery against the insurance company. Consequently, contractors would have to seek recovery from the Government.

The draft principle also requires that the contractor prove that it exhausted or was diligently pursuing such sources as insurance and other responsible parties to defray the cleanup costs.³¹³ The exclusion of costs resulting from a liability to a third party will act to hurt the governments attempt to defray costs under this paragraph. For example, if the contractor will have to admit the cost is not a liability to a third party in order to seek reimbursement from the Government and the insurer successfully argues that this admission to the Government, precludes insurer liability under a policy designed to cover liabilities to third parties, then the cleanup cost will not get defrayed.³¹⁴

Currently, the FAR provides for recovery of defrayed costs paid to contractors by insurance companies. Under the "Credits" cost principle, FAR 31.201-5, the Government is entitled to a pro rata credit of the contractors allowable insurance recovery costs.³¹⁵ Therefore, a mechanism is already available to prevent the contractor from receiving double payments if this was the concern of the drafters. The availability of insurance coverage does not determine the allowability of a cost nor does it determine the amount of the environmental cleanup cost. Therefore, the purpose of the exclusion of environmental cleanup costs resulting from third party liability is uncertain. On its face it only appears to hurt the Government's intention to spread the risk for environmental cleanup costs.

Finally, paragraph (d) of the draft cost principle would disallow costs incurred to correct environmental damage that was caused by the activity (or inactivity) of a previous owner, user or other lawful occupant of the property, except when the contractor proves that the predecessor party acted prudently and in compliance with then-existing environmental requirements.³¹⁶ What happens in the case of a contaminated property formerly owned by the Government? This is an issue because the Government is currently relinquishing ownership of properties to contractors under the Base Closure Program. Under this proposal, if a contractor seeks reimbursement for cleanup costs of a formerly Government-owned site, the cleanup costs would be allowable only if the contractor proves to the Government that the Government's

conduct was reasonable.³¹⁷ It seems unfair to burden the contractor with proving to the Government that the Government's conduct was reasonable.³¹⁸ Also, it seems unfair to require the contractor to pay for the Government's unreasonable conduct when the contractor fails to prove reasonable Government conduct.³¹⁹

B. Public Law 85-804

Potentially, Public Law 85-804, the National Defense Contracts Act,³²⁰ represents another avenue for indemnification of DOD contractors. Public Law 85-804 is derived from 50 U.S.C. § 1431 which provides;

The President may authorize any department or agency of the Government which exercises functions in connection with the national defense, acting in accordance with regulations prescribed by the President for the protection of the Government, to enter into contracts or into amendments or modifications of contracts heretofore or hereafter made and to make advance payments thereon, with regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense.³²¹

The authority of Public Law 85-804 is delegated to the Secretary of Defense through a series of Executive orders.³²² Collectively, these Executive Orders authorize the Secretary of Defense to use a contractual provision which provides that the United States will hold harmless and indemnify a contractor against any claim or loss arising out of or resulting from risks that the contract defines as unusually hazardous or nuclear in nature.

The authority granted to the Secretary of Defense under

Public Law 85-804 is limited in that it:

"[M]ay not be utilized to obligate the United States in any amount in excess of \$25,000,000 unless the Committees on Armed Services of the Senate and the House of Representatives have been notified in writing of such proposed obligation and 60 days of continuous session of Congress have expired following the date on which such notice was transmitted to such Committees".³²³

Currently, there are serious questions about when the Government should agree to assume liability, directly under contract terms, for losses associated with a contractor's liability for unusually hazardous risks.³²⁴ Historically, DOD interpreted Public Law 85-804 indemnification clauses narrowly. These indemnifications were limited to claims involving deaths, injury, property damage caused by nuclear radiation, damage caused by the use of high-energy propellants, or other risks that were not covered by the contractor's insurance.³²⁵ Recently, the Maxey Flats, KY case raised questions over whether DOD has properly abandoned this historical practice.³²⁶

The Maxey Flats case involved three Navy contractors' claims made under the nuclear risk indemnification clauses.³²⁷ Maxey Flats is a low level radioactive waste (LLRW) disposal site used from 1963 to 1977. Maxey Flats is owned and licensed by Kentucky. Various generators used the site including the Navy, other Federal agencies, government contractors and other private parties. The Navy's waste and the Navy contractors' waste resulted from the repair and overhaul of nuclear powered ships. Maxey Flats is now listed on the NPL. The total remediation costs cannot presently be determined. Some estimates declare

that the PRPs may be liable for about \$82 million. The Navy's potential remediation costs have been divided into direct shares and indirect shares. Direct share remediation costs come from disposal by Navy activities, such as the Naval Shipyards. Indirect shares remediation costs come from disposal by contractors performing work under Navy contracts.³²⁸

The indirect shares are the only remediation costs at issue. The Navy assumed responsibility for indirect shares through a Public Law 85-804 clause in the contracts.³²⁹ According to this clause the Navy agreed to indemnify the three contractors for claims by third parties for damage to persons or property not otherwise covered by insurance. The Navy reviewed the contractors claims and determined that it is appropriate to provide relief under the indemnification clauses of the contracts by assuming the contractors share of the remediation. The Navy also determined that the contract clause permitted it to take the place of these contractors in negotiations with EPA.³³⁰ Since the estimated liability is "in excess of \$25,000,000" notification of Congress is required in order to obligate the Government under Public Law 85-804.³³¹ The Navy, however, failed to notify Congress.³³²

The Navy's interpretation that the Public Law 85-804 clause to indemnify "contractors for claims by third parties for damage to persons or property not otherwise covered by insurance" has been questioned. According to GAO, the Navy's interpretation of the Public Law 85-804 clause in the Maxey Flats case amounts to

agreeing in advance to assume the contractors environmental cleanup costs because Maxey Flats is merely a low-level radiation waste disposal site.³³³ GAO argues that the Navy's apparently broad interpretation appears to have abandoned DOD's historically narrow interpretation of Public Law 85-804.³³⁴

According to DOD, Maxey Flats indemnification is based upon nuclear risk, not environmental cleanup.³³⁵ DOD argues indemnification for nuclear risk is perfectly consistent with the intent of Public Law 85-804. According to Deputy Under Secretary Sherri Wasserman Goodman, "DOD uses its authority under Public Law 85-804 to indemnify certain contractors against 'unusually hazardous or nuclear risks,' not to indemnify them against environmental cleanup costs".³³⁶ She went on to state that "on August 3, 1992, the Navy agreed to stand in the place of the three contractors for their CERCLA remediation at Maxey Flats, as an indemnified nuclear risk."³³⁷ DOD responded to the notification issue by asserting that such notice is only required at the time a contract is entered into.³³⁸ Congress indicated that DOD's position on notification under Public Law 84-805 seems to be at odds with the underlying intent of the statute, which requires congressional notification before funds are obligated.³³⁹

The application of Public Law 85-804 remains unresolved. DOD does not have policy guidance addressing the applicability of Public Law 85-804 to environmental cleanup costs. There are questions concerning whether DOD intends to indemnify all contractors who perform contracts with Public Law 85-804

clauses.³⁴⁰ There are questions about what constitutes unusually hazardous activities and whether the Public Law 85-804 indemnification clause was intended to cover environmental remediation costs at low level nuclear waste disposal site as unusually hazardous and uninsurable risks.³⁴¹ Congress has tasked DOD to review these issues. Meanwhile, Congress has indicated that it will continue to "closely monitor the use of Public Law 85-804 indemnification as an alternative to contractor claims for reimbursement of environmental cleanup costs as part of overhead rates." ³⁴²

VIII. Recommendations - Apply Insurance Industry Principles to the Indemnification Problem.

Applying insurance principles to the indemnification problem will help stabilize environmental cleanup activities. Currently lenders may be reluctant to lend to hazardous waste contractors or contractors that work near hazardous waste because they may be found labile for cleanup costs notwithstanding the EPA's Final Rule on lender liability under CERCLA.³⁴³ Lender liability threatens the Federal deposits insurance fund which the taxpayers support.³⁴⁴ Also, the intent of environmental cleanup legislation will be frustrated if contractors can not receive financing for their activities.

The courts' trend to include both legal and equitable damages in the "as damages clause" will cause the insurance

industry to continue to view environmental cleanup activities as a bad risk.³⁴⁵ This trend may cost the insurance industry billions of dollars if the current liability scheme is not adjusted. In many cases insurer insolvency could become a problem as a result of this trend. Insurer insolvency threatens the taxpayers. Pressure on lenders and insurers could cause the environmental cleanup effort to collapse.

Eventually, the United States could be held liable for these costs and it may be forced to develop a totally public system to tackle the problem. This could result in tremendous tax increases. This is a compelling reason to encourage private participation in the cleanup effort. Since the United States is the last level of environmental insurance it should consider insurance industry principles to solve the indemnification problem. Many of problems that stifle private participation are resolvable by viewing the problem from the stand point of an insurer.

A. Risk Assessment.

In order to understand the indemnification problem the government must completely understand the risk and the likelihood of an occurrence. The insurance industry has developed risk assessment into a profitable business.³⁴⁶ The insurance industry uses actuarial principles to help assess a risk. Once a risk is generally understood it is standardized. Only after the

standardization process is insurance offered to the public. The insurance industry has defined guidelines which provide a reasonable foundation to the underwriters before accepting a risk.³⁴⁷

Currently, underwriters of environmental cleanup cost liability do not have a reasonable foundation for risk assessment. First, the "how clean is clean" question has not been answered. The statutes fail to specify an acceptable risk level or cleanup goal that should be achieved at cleanup sites. For example, CERCLA fails to specify cleanup goals and levels; therefore, the EPA is forced to determine "how clean is clean" in an inaccurate process requiring lengthy investigation and decision making. Without a consistent method for determining an acceptable risk level or cleanup goal there can be no reliable method for determining an appropriate remedy.³⁴⁸

There often is substantial uncertainty about the risk associated with any hazardous material site. Often there is a lack of data on some contaminants' toxicity.³⁴⁹ There are few standards for contaminated soil because the toxicity of individual contaminants, the exposure pathways, and their effects on human health and the environment are not totally understood. Consequently, generic cleanup standards and remedies do not exist.³⁵⁰

In order to compensate for risk uncertainties in a Superfund site, the EPA makes conservative risk assumptions. Generally, these conservative risk assumptions involve favoring expensive

protective remedies over less expensive and less protective remedies. This conservative method is used because the EPA assumes that the site needs to be cleaned up for possible residential use in the future. The EPA does not consider the current use or the input from the local community about the future land use.³⁵¹ Therefore, cleanup levels and remedies are often inconsistently determined on a site by site basis.

The EPA's remedy selection process treats each site as unique. The National Oil and Hazardous Substances Pollution Contingency Plan (NCP) is the EPA regulation that governs remedy selection.³⁵² The NCP sets forth criteria for evaluating cleanup remedies. These criteria often overlap and conflict. The NCP also outlines EPA's general considerations in developing appropriate remedial alternatives. Because there are so many conflicting criteria the most appropriate remedy is often not easily distinguishable. Consequently, the NCP gives EPA discretion to choose remedies that can vary from region to region. Tom Grumbly, President of Clean Sites, stated:

[T]he current remedy selection process works backwards. EPA explores in-depth all of the various cleanup alternatives it plans to consider before thinking about what we all want to achieve at these places and what the level of protection is that we are seeking. We also found not surprisingly that there is no consensus about what people consider to be protection of health and the environment. As a result, the levels of protection end up varying from site to site, depending more on whim than on any particular direction from anyone.³⁵³

The "how clean is clean" issue must be resolved. Federal and state standards must be consistent on cleanup requirements based on currently available data. Although some contaminants are not

totally understood, definite cleanup standards should be established based on current data and periodically updated as new reliable data is established. Cleanup standards based on current data may not be prefect but they will help provide a foundation for cleanup cost risk assessment.

Also, the risk/remedy assessment process should include the local community's input on the future land use.³⁵⁴ Cleanup standards may reasonably vary depending on the future land use. However, considering future land use will help to focus on the appropriate remedy as well as to speed up the remedy selection process. For instance, land that is zoned for future industrial use may be cleaned quicker and less expensively if it is cleaned to an acceptable standard that is lower than the cleanup standard of land that is zoned for future residential use.³⁵⁵ Including future land use in the risk assessment process can help standardize "how clean is clean" for specific situations. This will help bring stability to remedy application. Future land use is another building block needed for risk assessment.

B. Theory of Liability.

Another factor that must be considered in assessing the risk in environmental cleanup costs liability is the theory of liability. For instance, Superfund's strict, joint, several retroactive liability provision is a major obstacle to insurability. The liability system allows the Government to

compel virtually any party no matter how distant that party's connection with the site, to pay for all of the costs of cleanup. This factor has basically eliminated hazardous material cleanup from the environmental insurance market. If Congress changed this provision it would stimulate many insurers to reevaluate the profitability of providing environmental cleanup insurance.

There are alternatives to the current strict, joint, several and retroactive liability provision. The current Superfund system could be replaced by a public works cleanup program that would relieve the responsible parties of cleanup costs imposed by the retroactive applicability of the current Superfund liability scheme.³⁵⁶ This alternative requires abandoning the "polluter pays" principle and substantially increasing taxes.³⁵⁷

A strictly apportioned liability system could replace the current liability scheme.³⁵⁸ Here administrative law judges determine liability and the share of liability early in the remediation process.³⁵⁹ An administrative determination would be a binding allocation of responsibility (BAR) decision, subject to limited judicial review.³⁶⁰ Orphan shares, responsible parties who are unidentifiable, nonexistent, or insolvent, could be paid out of the Superfund or the by the other responsible parties.³⁶¹ This could result in substantial increases in taxes if the orphan shares are paid out of the Superfund.³⁶²

An apportioned liability is another option to the current liability scheme.³⁶³ This is a variation of the strictly apportioned liability. In this situation the cleanup costs would

be apportioned equitably, by administrative law judges, in relation to the amount of waste each party contributed.³⁶⁴ Like strictly apportioned liability, orphan shares could be paid either by the Superfund or by the responsible parties.³⁶⁵

Another option to the present liability system is to totally change the theory of liability. Change strict liability to negligence. The EPA maintains that strict, joint, several, and retroactive liability of the Superfund program often provides the impetus for waste site cleanup.³⁶⁶ The current liability scheme relieves the EPA of the costly responsibility of identifying all contributors to a hazardous waste site. On the other hand, the current liability system does not consider fault. Considering fault and the contribution of the fault would settle many fairness concerns and it would place environmental cleanup activities and liabilities on the same plain as other insurable activities and liabilities. Adjusting the theory of liability from the current standard will prove a substantial step toward making the risk of environmental cleanup costs insurable.

C. Insurance Industry Regulation.

Regulation of the insurance industry is another factor in risk assessment. If the allegations are true in the *Hartford Fire Ins. Co.* case,³⁶⁷ then domestic insurers will join forces with foreign reinsurers when it is in their mutual interests. The larger insurers influence the activities of the smaller insurers.

This has substantial ramifications because under the McCarran-Ferguson Act³⁶⁸ the American tax payer has generally limited to the States the regulation of the insurance industry. Therefore, the largest insurance company, the collective body of the American tax payers, generally can not effectively influence the activities of the smaller insurers.

In order to resolve this problem, the federal government should regulate the business of insurance in order to stabilize the risks caused by current insurance practices. Regulation of the insurance industry will impact on whether the federal government will ultimately become liable.

This regulation should be limited to preventing the federal government from becoming subject to actions from the insurance industry that stifle fair competition. This would include regulating a commercial or industrial establishment, any mercantile transactions, buying and selling, and traffic, as well as, any agreement among insurers to boycott, coerce, or intimidate to the extent that it impacts on fair competition in the insurance industry. Also, federal regulation should include close insolvency oversight. Currently, some in the insurance industry favor federal insolvency oversight.

This kind of regulation closely parallels a reinsurer monitoring the activities of a lower level insurer to determine the likelihood of becoming liable for the insured's risk. The major difference is that the federal government can go a step further to influence the conduct of the lower level insurer by

actually regulating conduct.

If the federal government regulated the insurance industry in this manner, then improper collusion in the industry would be closely monitored. Competition in the insurance industry could be stimulated. For instance, if the alleged collusion in the *Hartford Fire Ins. Co.*³⁶⁹ case were prevented then there would be a true picture of whether other insurers are willing to insure environmental cleanup costs under the old CGL policies. According to the facts in that case the 1986 CGL policy was developed only because a few primary insurers initially demanded a change.³⁷⁰ Other insurers may have been willing to provide insurance under pre-1986 CGL forms.³⁷¹

If other insurers are willing to insure on pre-1986 CGL forms then the federal government can prudently determine the appropriate level of indemnification to provide. For example, if other insurers are willing to provide insurance, then the risk of federal indemnification is reduced. If the primary policy is adequate then a reinsurer may assume a part of the risk from the primary insurer. Every level of insurance provided in an open competition insurance market substantially reduces the chances of federal indemnification. The risk will spread. The federal government may be able to step in at a position equivalent to a third or fourth level reinsurer. It may be possible that federal indemnification will not be necessary at all. On the other hand, if the an open competition insurance market determines that primary insurance is limited, then it may be necessary for the

federal government to provide substantial excess insurance to the insured. In any case, federal oversight of the insurance industry can be used to stimulate the insurance industry to voluntarily spread the risk of harm. If the risk of harm is spread among several insurers the risk becomes more favorable to insurers at every level.

In order to determine whether environmental cleanup costs are reasonably insurable, insurers must be allowed to compete without the threat of boycotts or other action that unfairly impact on competition. If the allegations in the *Hartford Fire Ins. Co. case*³⁷² are true we do not know whether environmental costs are reasonably insurable.

The insurability of environmental cleanup costs will naturally have an impact on the government's decision to include indemnification clauses in contracts. If environmental costs are reasonably insurable it may not be necessary to provide an indemnification clause in a government contract. If environmental cost insurability is limited then the government can decide the proper level of indemnification that it must provide. Finally, if environmental costs are insurable it may not be necessary to have a special environmental cost principle.

The above factors will help to assess the risk of environmental indemnification. Once the risk has been adequately assessed, and the risk is found insurable, then the method of insurance can be determined. The government could properly

determine the level of needed indemnification. It could decide whether to provide self insurance, excess insurance or actually reinsure an insurance company.

Even if all of the above suggestions are implemented there may be some environmental risks which insurers are not willing to assume. Unusually hazardous or nuclear risks are likely to fall within this category. Most environmental cleanup costs may not fall within this category. If a risk is reasonably insurable then it is not necessary to apply Public Law 85-804 because the insurance industry will provide indemnification. If a risk, that is unusually hazardous or nuclear, is not reasonably insurable then Public Law 85-804 is applicable because the insurance industry will not provide indemnification. Therefore, determining whether low level radiation was insurable at the time the contract was awarded is required in order to determine whether the Navy properly decided to grant Public Law 85-804 indemnification in the *Maxey Flats* case.

IX. Conclusion.

The problem of indemnifying environmental cleanup costs can be resolved if the government approaches the problem from the standpoint of an insurer. This approach will force the government to establish a proper foundation for risk assessment. A proper foundation for risk assessment includes determining "how clean is clean" and the future land use.

The theory of liability is another factor in assessing the risk of environmental cleanup cost liability. If the strict, joint, several and retroactive provision is adjusted it will cause insurers to reevaluate the insurability of environmental cleanup costs. Also, if lender liability is limited by Congress to negligent lender property management, then lenders may be willing to participate in the cleanup effort. In any event, it will reduce the threat that cleanup costs causes to taxpayers through reimbursement of the Federal deposits insurance fund.

Federal regulation of the business of insurance is a factor in assessing the risk. If the federal government regulated the business of insurance to encourage fair competition and to prevent insurer insolvency, then the risk of the government actually paying environmental cleanup costs may be reduced. Fair and open competition in the insurance industry along with other adjusted risk assessment factors will prove many environmental cleanup costs reasonably insurable. It will spread the risk.

This approach provides a sound framework for the indemnification of environmental cleanup costs. It will reduce the risk of loss to the taxpayer, reduce cleanup costs and stimulate private participation in the cleanup effort.

ENDNOTES

1. SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT OF THE HOUSE COMM. ON PUBLIC WORKS AND TRANSPORTATION, ADMINISTRATION OF THE FEDERAL SUPERFUND PROGRAM, H.R. DOC. NO. 103-35, 103d Cong., 1st Sess. 1 (1993) [hereinafter SUPERFUND REPORT].

2. *Id.* (cleanup construction has been completed at another 112 sites, and it is estimated that about half of all the Superfund sites have had some waste removal completed).

3. *Id.*

4. *See supra* pp. 35-40.

5. *See supra* pp. 23-35.

6. *See supra* pp. 40-44.

7. *See supra* pp. 24-28.

8. SUPERFUND REPORT, *supra* note 1, at 10 ("In his State of the Union Address, President Clinton said 'I'd like to use Superfund to cleanup pollution for a change, not just pay the lawyers.' The costs to determine Superfund liability--which are primarily legal expenses--are distinct from the cleanup costs, and are referred to as 'transaction costs'. The RAND Corporation, in a 1992 study, estimated that transaction costs for five very large

corporate responsible parties averaged 21 percent of total hazardous waste costs. About 75 percent of the transaction costs were attributed to legal expenses. RAND also studied four insurance companies and estimated that their transaction costs have averaged 88 percent of their total expenditures on hazardous waste sites. Many industries and their insurers argue that the cost of settling the allocation of liability for Superfund cleanups rivals the cost of actually cleaning up the sites. They assert that the Superfund liability system itself has caused extensive litigation over liability and cost allocation issues.").

9. *See supra* pp. 28-35.

10. *See supra* pp. 44-63.

11. *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

12. *Lender Liability Under Hazardous Waste Laws: Hearings before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 1st Sess. 18 (1991) [hereinafter *Lender Hearings*] (statement J. French Hill, Deputy Assistant Secretary, Corporate Finance, Department of the Treasury).

13. *Id.*

14. *See generally* KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW (1991).

15. *Id.* at 15.

16. ROBERT RIEGEL ET AL., INSURANCE PRINCIPLES AND PRACTICES, PROPERTY AND LIABILITY 6TH EDITION 18-20 (1976). According to the Law of Large Numbers, the chance that the relative frequency of failures will differ from the underlying probability by any stated amount (even the smallest) approaches zero as the number of trials increases. The function of insurance is to combine a larger number of risks and thus reduce the degree of risk and hence uncertainty. Also, the future can be predicted much more accurately for a group of exposure units than for an individual exposure unit. *See also* ABRAHAM, *supra* note 14, at 15.

17. *Id.*

18. *Id.*

19. *Brown v. Helvering*, 291 U.S. 193 (1941).

20. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 31.205-19 (1 Apr. 1984) [hereinafter FAR].

21. *Id.*

22. DENENBERG ET AL., RISK AND INSURANCE 85 (1964). See also ABRAHAM, *supra* note 14, at 17.
23. ABRAHAM, *supra* note 14, at 17.
24. Eugene R. Anderson et al., *Liability Insurance; A Primer for Corporate Counsel*, 49 BUS. LAW. 259, 290 (1993).
25. ABRAHAM, *supra* note 14, at 17-8.
26. *Id.*
27. *Id.*
28. *Id.*
29. Olympic Ins. Co. v. Employers Surplus Lines Ins. Co., 126 Cal.App.3d 593, 597-98 (1981).
30. *Id.*
31. *Id.*
32. Eileen M. Dacey, *Issues in Excess Coverage*, in 477 INSURANCE COVERAGE LITIGATION 1993: CRITICAL ISSUES AND STRATEGIES - A SATELLITE PROGRAM 243, 245-46 (Raoul D. Kennedy & John H. Mathias, Jr., Practising Law Institute, 1993).
33. *Id.*
34. *Id.* at 247-48.

35. *Id.* at 248.

36. *Id.* at 249. (excess insurance is less expensive because the risk at this level is limited. Generally, smaller losses will occur more frequently than big losses. Therefore, it is less likely that a particular excess layer of insurance will be reached to actually pay a claim).

37. *Id.* at 151.

38. *See, e.g.,* *Laster v. American National Fire Ins. Co.*, 775 F. Supp. 985, 992 (N.D. Tex. 1991), *aff'd*, 966 F.2d 676 (5th Cir. 1992).

39. *Aetna Cas. & Surety Co. v. Certain Underwriters at Lloyds*, 56 Cal.App.3d 791 (1976).

40. *Great Atlantic Ins. Co. v. Liberty Mut. Ins. Co.*, 773 F.2d 976 (8th Cir. 1985); *L. E. Meyers Co. v. Harbor Ins. Co.*, 394 N.E.2d 1200 (Ill. 1979).

41. 801 F. Supp. 1334 (D. NJ 1992).

42. *Id.* at 1357.

43. *Continental Casualty Co. v. Armstrong World Industries, Inc.*, 776 F. Supp. 1296 (N.D. Ill. 1991) (a primary carrier's limits must be exhausted before the excess carrier will be bound to defend or indemnify the insured). *See, e.g.,* *Continental Cas.*

Co. v. Synalloy Cop., 667 F.Supp. 1523 (S.D. Ga., 1983). Olympic Ins. Co. v. Employers Surplus Lines Ins. Co., 125 Cal. App. 3d 593 (1982); Signal Companies v. Harbor Ins. Co., 27 Cal. 3d 359 (1980).

44. Associated Intern. Ins. Co. v. St. Paul Fire & Marine Ins. Co., 220 Cal. App. 3d 692, 269 Cal. Rptr. 485, 488 (Cal. App. 1990), *review denied and opinion withdrawn*, 1990 Cal.LEXIS 3945 (Cal. Aug. 30, 1990).

45. *Id.*

46. *Id.*

47. *Id.*

48. Continental Casualty Co. v. Armstrong World Ind. Inc., 776 F. Supp. 1296, 1301-02 (N.D.Ill. 1991). *See also* Associated Int.'l Inc.'s. Co. v. St. Paul Fire & Marine Ins., Co., 220 Cal. App. 3d 692, 269 Cal.Rptr. 485 (Cal. App. 1990); Olympic Ins. Co. v. Employees Surplus Lines Ins. Co., 126 Cal. App. 3d 593, 178 Cal. Rptr. 908, 912 (1981).

49. M. Metzner, *Excess Insurance Coverage Issues*, in 454 10TH ANNUAL INSURANCE, EXCESS, AND REINSURANCE COVERAGE DISPUTES 419, 424-32 (Barry R. Ostrager & Thomas R. Newman, Practising Law Institute, 1993).

50. *Id.*

51. *See, e.g.,* Prince Carpentry Inc. v. Cosmopolitan Mut. Ins. Co., 124 Misc.2d 919, 479 N.Y.S. 2d 284 (N.Y.Sup. 1984).
52. Reserve Ins. Co. v. Pisciotta, 30 Cal.3d 800, 815 (1982).
53. *Id.*
54. *See, e.g.,* Reserve Ins. Co. v. Pisciotta, 30 Cal.3d 800, 640 P.2d 764, 180 Cal. Rptr. 628 (1982); Donald B. MacNeal, Inc. v. Interstate Fire & Cas. Co., 477 N.E.2d 1322 (Ill.App.Ct. 1985).
55. New Process Baking Co. v. Federal Ins. Co., 923 F.2d 62 (7th Cir. 1991).
56. *See, e.g.,* Ambassador Associates v. Corcoran, 79 N.Y.S.2d 276 (1992); Arkwright-Boston Manuf. Mut. Ins. Co. v. Aries Marine Corp., 932 F.2d 442, 446 (5th Cir. 1991).
57. Employers Ins. of Wausau v. American Centennial Ins. Co., No. 86 Civ. 8576 (KTD), slip op. at 2 (S.D.N.Y. Jan. 24, 1989).
58. Kemper Reins. Co. v. Corcoran (In re Midland Ins. Co.), 79 N.Y.2d 253, 258, 590 N.E.2d 1186, 1188, 582 N.Y.S.2d 58, 60 (N.Y., 1992).
59. *See, e.g.,* Excess & Casualty Reins. Ass'n v. Insurance Comm'r, 656 F.2d 491, 492 (9th Cir. 1981).
60. *Id.*

61. Colonial American Life Insurance Co. v. Commissioner, 491 U.S. 244-47 (1989).

62. *Id.*

63. *Id.*

64. *Id.*

65. China Union Lines, Ltd. v. American Marine Underwriters, Inc, 755 F.2d 26, 30 (2d Cir. 1985).

66. *Insurer Liability for Cleanup of Hazardous Waste Sites: Hearings before the Subcommittee on Policy Research and Insurance of the Committee on Banking, Finance and Urban Affairs, House of Representatives, 101st Cong., 2d Sess. 224-5 (1990) [hereinafter Insurance Hearings]* (material submitted with the testimony of Dennis R. Connolly, Johnson and Higgins).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 227-8.

71. *Id.* at 226.

72. *Frye v. United States*, 293 F. 1013 (App.D.C., 1923).

73. *Daubert v. Merrell Dow Pharmaceuticals*, 113 S.Ct 2786 (1993).
74. *Id.*
75. *Insurance Hearings*, *supra* note 66, at 227.
76. *Id.*
77. *Id.*
78. *Insurance Hearings*, *supra* note 66, at 209-212 (statement by David Rosenberg, Executive Vice President, Environmental Compliance Services, Inc.).
79. *Id.*
80. *Id.*
81. *Id.*
82. *Insurance Hearings*, *supra* note 66, at 7-9 (statement of Peter F. Guerrero, Associate Director, U.S. General Accounting Office, Environment Protection Issues Resources, Community, and Economic Development Division). *See also Insurance Hearings*, *supra* note 66, at 50-59 (material submitted for the record, Potential Liability of Property/Casualty Insurers for Costs of Cleaning Up Hazardous Waste Sites, GAO/T-RCED-90-109. Sept. 27, 1990).

83. *Insurance Hearings*, *supra* note 66, at 58.

84. *Id.* at 59.

85. *Id.*

86. *Id.* (the National Association of Insurance Commissioners consists of the heads of insurance departments of the 50 states, the District of Columbia, and four U.S. territories. Its basic purpose is to encourage uniformity and cooperation among the states and territories as they individually regulate the insurance industry.).

87. *Id.* (citing, *Insurer Failures: Property/Casualty Insurer Insolvencies and State Guaranty funds* GAO/GGD-87-100, July 1987).

88. EILLEN M. DACEY, *Insurer Insolvency/Status of the London Market: Where are things Headed?*, in 477 *INSURANCE COVERAGE LITIGATION 1993: CRITICAL ISSUES AND STRATEGIES - A SATELLITE PROGRAM* 379, 393-94.

89. *Id.*

90. Stacy Shapiro & Gavin Souter, *Doubts about Lloyd's*, *BUSINESS INSURANCE*, Aug. 2, 1993, at 31.

91. DACEY, *supra* note 32, at 384-85.

92. *Id.* at 385. *See also* HUGH COCKERELL, *LLOYD'S OF LONDON A PORTRAIT* (1984).

There are over 400 underwriting syndicates at Lloyd's, classified according to the class of business they transact into marine, non-marine, aviation, motor and life. An underwriting member, in order to spread his risk, usually joins three or four syndicates.... The remedy for any underwriting member who is dissatisfied is to leave the syndicate at the end of the year for which it is formed, as syndicates are reconstituted annually.

Id. at 3.

93. *Id.* See also PAUL MOWER & JOHN RAYER, WHAT'S IN A NAME? (1984). The liability of the underwriting member at Lloyds is unlimited. In the event of there being a deficiency on an underwriting account, Lloyds will call firstly on the Name to pay. New Names will probably have to fund this deficiency from their own resources but established Names would be able to call on their Lloyds reserves.

Id. at 4. See also HUGH COCKERELL, LLOYD'S OF LONDON-A PORTRAIT (1984).

Outside Lloyd's, insurance is transacted by insurance companies with capital provided by shareholders whose liability under the companies' contracts is limited for each shareholder to the amount of capital that he or she has subscribed. Lloyd's proceeds on a different and older basis. It is not a limited company at all. Instead it is a society, or club, of some 20,000 individuals called

underwriting members, or 'Name(s)'. Each underwriting member accepts unlimited liability for his share of any insurance accepted on his behalf in the Room. This liability arises only in respect of his share. He is not liable for the shares in an insurance of any other member, but for his own share he must answer with the whole of his fortune if necessary.

Id. at 2.

94. Dacey, *supra* note 88, at 385.

95. *Id.* at 385-86.

96. *Id.* at 387.

97. *Id.* at 387.

98. *Id.*

99. *Id.*

100. *Id.* at 391.

101. *Id.* at 390.

102. *Id.* at 388.

103. *Id.* at 384. See also Stacy Shapiro & Gavin Souter, *Doubts about Lloyd's*, BUS. INS., August 2, 1993, at 31-2 (stating that Lloyd's may introduce a two-year accounting system. Currently,

Lloyd's reports its results after three years to ensure profits and losses are allocated to the correct year).

104. Shapiro and Souter, *supra* note 90, at 32.

105. DACEY, *supra* note 88, at 386.

106. Shapiro and Souter *supra* note 90, at 31.

107. *Insurance Hearings*, *supra* note 66, at 199-200 (letter from Eugene R. Anderson, Anderson Kill Olick & Oshinsky, P.C, to Chariman Ben Erdreich, Subcommittee of the Banking, Finance and Urban Affairs Committee, United States House of Representatives, dated Sept. 27, 1990).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. ABRAHAM, *supra* note 14, at 23.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 24, (citing B. Ostrager & T. Newman, Handbook on Insurance Coverage Disputes section 4.02 at 79 3d ed. 1990).

119. *Hallowell v. State Farm Mutual Automobile Insurance Co.*, 443 A.2d 925, at 926 (Del.1982).

120. *See New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162 (3rd Cir. 1991); *Aetna Casualty & Surety Co. v. Kenner*, 570 A.2d 1172 (Del.1990).

121. ABRAHAM, *supra* note 14, at 28.

122. *Id.*

123. *Aetna Casualty & Surety Co. v. Kenner*, 570 A.2d 1172, 1174 (Del.1990).

124. *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1189 (3rd Cir. 1991).

125. *Id.*

126. Henderson, *The Doctrine of Reasonable Expectations After Two Decades*, 51 Ohio St. L.J. 823 (1990).

127. *Keene Corp. v. Ins. Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

128. ABRAHAM, *supra* note 14, at 29.

129. *Id.*

130. *Id.* at 30.

131. *See, e.g.,* Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., 69 Cal.2d 33, 442 P.2d 641, 69 Cal. Rptr. 561 (Cal. 1968).

132. ABRAHAM, *supra* note 14, at 30 (citing Uniform Commercial Code §§ 2-208(2), 1-205(4); *In re Asbestos Insurance Coverage Cases*, judicial Council Coordination Proceeding No. 1072, Statement of Decision Concerning Phase III Issues, slip. op. at 39-40 Cal. Super. Ct. San Francisco Cty. Jan. 24, 1990).

133. ABRAHAM, *supra* note 14, at 30.

134. *Id.*

135. *Id.* at 33.

136. *Id.*

137. *Id.* at 34.

138. *Id.* at 34-5 (the standardization makes it possible for ISO to collect and maintain data on the claims and loss experience under different kinds of policies, and the projection of future losses under these policies).

139. *Id.* at 43.

140. *Id.*
141. *Id.* at 44-5.
142. 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).
143. *See, e.g., Maryland Casualty Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).
144. *See, e.g. Continental Ins. Cos. v. Northeastern Pharmaceutical and Chemical Co.*, 842 F.2d 977 (8th Cir. 1988).
145. *Id.*
146. *See, e.g., Intel Corp. v. Hartford Accident & Indemnity Co.*, 692 F.Supp. 1171 (N.D.Cal. 1988); *Fireman's Fund Insurance Cos. v. Ex-Cell-O Corp.*, 662 F.Supp. 71 (E.D.Mich. 1987); *Aerojet-General Corp. v. San Mateo County Superior Court*, 211 Cal.App.3d 216, 257 Cal.Rptr. 621, 258 Cal.Rptr. 684 (1989); *CPS Chemical Co. v. Continental Insurance Co.*, 222 N.J.Super. 175, 536 A.2d 311 (1988).
147. 42 U.S.C. § 9606 (1988).
148. 42 U.S.C. §9607 (1988).
149. 42 U.S.C. § 9606 (1988).
150. 42 U.S.C. § 9607 (1988).

151. *See, e.g., Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d 1348 (4th Cir.1987), *cert. denied*, 484 U.S. 1008 (1988); *Intel Corp. v. Hartford Accident & Indemnity Co.*, 692 F.Supp. 1171 (N.D.Cal.1988).

152. *Continental Ins. Cos. v. Northeastern Pharmaceutical & Chemical Co.*, 842 F.2d 977 (8th Cir.) (*en banc*), *cert. denied*, 488 U.S. 821 (1988).

153. *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1188 (3rd Cir. 1991).

154. 842 F.2d 977 (8th Cir. 1988).

155. 842 F.2d at 985.

156. *Id.* at 985.

157. *Id.* at 985.

158. *Id.* at 985-86.

159. *Id.* at 985.

160. 933 F.2d 1162 (3rd Cir. 1991).

161. 933 F.2d at 1190 (quoting *NEPACCO* 842 F.2d 977, 985 (1988)).

162. *New Castle County v. Hartford Acc. and Indem. Co.*, 933 F.2d 1162, 1190 (3rd Cir. 1991).

163. Independent Petrochemical Corporation, et al. v. Aetna casualty & Surety Co., et al., 944 F.2d. 940, 946 (D.C. Cir. 1991).
164. 777 F. Supp. 968 (D.D.C. 1991).
165. *Id.* at 976.
166. *Id.*
167. *Id.* (quoting American Ins. Co. v. Tutt, 314 A2d 481, 485 (D.C.App. 1974)).
168. 777 F.Supp. 968 (D.C.C. 1991) (citing New Castle County v. Hartford Accident and Indem. Co., 673 F.Supp. 1359, 1365 (D.Del. 1987)).
169. 113 S.Ct. 2891 (1993).
170. 15 U.S.C. § 1 (1988 & Supp. IV 1992).
171. 15 U.S.C. § 1 (1988 & Supp. IV 1992).
172. 113 S.Ct. at 2900, 901.
173. 15 U.S.C. § 1012(b) (1988).
174. 113 S.Ct. at 2903.
175. 113 S.Ct. 2891 (1993).

176. The Act is codified as part of the Solid Waste Disposal Act at 42 U.S.C. § § 6901-6933 (1988).

177. Amended by the Superfund Amendments and Reauthorization Act of 1986, or "SARA." 42 U.S.C. § § 9601-9674 (1988).

178. 42 U.S.C. § § 6901-6933 (1988).

179. *Id.*

180. 42 U.S.C. § 6973 (1988).

181. 42 U.S.C. § § 6924(e), 6928(h) (1988).

182. 42 U.S.C. § § 6924(e), 6928(h) (1988).

183. 42 U.S.C. § § 6901-6933 (1988).

184. 42 U.S.C. § 9605 (1988).

185. *Insurance Hearings, supra* note 66, at 40 (statement of James M. Stock, Assistant Administrator for Enforcement, U.S. Environmental Protection Agency).

186. *Insurance Hearings, supra* note 66, at 53 (statement by P. Guerro submitted to the Subcommittee on Policy Research and Insurance, Committee on Banking, Finance and Urban Affairs, House of Representatives citing Superfund: Extent of Nation's Potential Hazardous Waste Problem Still Unknown (GAO/RCED-88-44, Dec. 1987)).

187. *Insurance Hearings*, *supra* note 66, at 37 (statement of James M. Stock).
188. *Id.*
189. *Id.* at 37-8.
190. *Id.* at 38.
191. 42 U.S.C. § 9607(a) (1988).
192. 42 U.S.C. § 9607(c)(3) (1988).
193. 42 U.S.C. § 9607(a) (1988).
194. *See, e.g., United States v. Chem-Dyne Corp.*, 572 F.Supp. 802, 805-10 (S.D. Ohio 1983).
195. *Insurance Hearings*, *supra* note 66, at 38,9 (testimony of James M. Stock).
196. 42 U.S.C. § 9607(b) (1988).
197. 42 U.S.C. § 9613(f)(1) (1988).
198. *Insurance Hearings*, *supra* note 66, at 38,9 (statement of James M. Stock).
199. 42 U.S.C. § 9622 (1988).
200. *See, e.g., United States v. Cannons Engineering Corp.*, 720 F.Supp. 1027 (D.Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990).

201. *Insurance Hearings*, *supra* note 66, at 38-9 (statement of James M. Stock).
202. 42 U.S.C. § 9601(35)(A) (1988).
203. 42 U.S.C. § 9601(35)(A)(i) (1988).
204. 42 U.S.C. § 9601(20)A(iii) (1988).
205. *Id.*
206. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).
207. *Id.*
208. *Id.* at 1557-58.
209. See Joel R. Burcat, *Foreclosure and United States v. Maryland Bank & Trust Co.: Paying the Piper or learning How to Dance to a New Tune?*, 17 ENVTL. L. REP. 10,098, 0,099 (Apr. 1987).
210. See, e.g., *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); *Guidice v. BFG Electroplating & Mfg. Co.*, 732 F. Supp. 556, 562 (W.D. Pa. 1989).
211. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability under CERCLA, Final Rule, 57 Fed. Reg. 18,344 (1992) (codified at 40 C.F.R. section 300.1100-1105)

(1992)). *See also*, 56 Fed. Reg. 28,798 (1991) (responding to concerns of the banking community and in light of the federal government's increasing role as a secured creditor after taking over failed savings and loans when legislative efforts to amend CERCLA failed). *See, e.g.*, H.R. 4494, 101st Cong., 2d Sess. (1990).

212. 40 C.F.R. section 300.1100(c)(1)(i) (1993).

213. *Id.*

214. 40 C.F.R. section 300.1100(c)(1)(ii) (1993).

215. 40 C.F.R. section 300.1100(c)(20(ii)(A) (1993).

216. National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability, Final Rule, 57 Fed. Reg. 18,344, 18,368 (1992). *See also* Kelley v. Environmental Protection Agency, 1994 U.S. App. LEXIS 1715 (D.C. Cir.Feb. 4, 1994) (in this case the United States Court of Appeals for the District of Columbia Circuit held that the Final Rule can not regulate, define or limit a party's liability).

Questions of liability, accordingly, can be put at issue in federal court by disputing private parties--without any government involvement. Under these circumstances, it cannot be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants.

Id. at 8 (therefore private parties may sue lenders whether or not the EPA would regard the lender as liable).

217. See generally *Kelley v. Environmental Protection Agency*, 1994 U.S. App. LEXIS 1715 (D.C. Cir.Feb. 4, 1994).

218. Roger D. Staton, *EPA's Final Rule on Lender Liability: Lenders Beware*, 49 BUS. LAW., 163, 181 (Nov. 1993).

219. *Id.* at 182.

220. *Id.*

221. *Id.*

222. See generally *Insurance Hearings*, *supra* note 66.

223. *Insurance Hearings*, *supra* note 66, at 258 (material submitted by Johnson & Higgins).

224. 42 U.S.C. § 9607 (1988).

225. *Id.*

226. 42 U.S.C. § 9619 (1988).

227. *Id.*

228. SUPERFUND REPORT, *supra* note 1, at 163.

229. *Id.*

230. *Id.*

231. *Id.* (citing the EPA Office of Solid Waste and Emergency Response (OSWER) Directive 9835.5, issued in October 1987).

232. SUPERFUND REPORT, *supra* note 1, at 163.

233. *Id.*

234. *Id.* at 164.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 164-65.

242. *Id.* at 165.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. 42 U.S.C. § 9607 (1988).

251. *See generally Defense Department Reimbursement of Contractors' Environmental Cleanup Costs, Hearings before the Subcommittee on Legislation and National Security, U.S. House of Representatives, Committee on Government Operations, 103d Congress, 1st Sess. (1993), [hereinafter Cleanup Costs Hearings].*

252. *Id.* at 3.

253. *Id.*

254. *Id.* at 3-7.

255. FAR 31.201-3(b)(1).

256. FAR 31. 201-2.

257. 10 U.S.C. 2324 (e)(1)(D) (1988), FAR 31.
205-15.

258. *Cleanup Costs Hearings, supra* note 251, at 284-85.

259. *Id.* at 285.

260. *Id.* See also 42 U.S.C. 9607(a).
261. FAR 31.201-3(a).
262. FAR 31.201-3(b)(2), FAR 31.201-3(b)(3).
263. *Cleanup Costs Hearings*, *supra* note 251, at 285.
264. *Id.*
265. *Cleanup Costs Hearings*, *supra* note 251, at 37 (statement of Sherri Wasserman Goodman, Deputy Under Secretary of Defense, Environmental Security).
266. *Id.* at 35.
267. *Id.* at 37.
268. *Id.* at 34-5.
269. *Cleanup Costs Hearings*, *supra* note 251, at 2 (statement of The Honorable Carolyn B. Moloney, Committee on Government Operations).
270. *Id.* at 2-4.
271. *Id.* at 3.
272. *Id.*
273. *Cleanup Costs Hearings*, *supra* note 251, at 9 (statement of Donna M. Heivilin, Director, Defense Management and NASA Issues,

National Security and International Affairs Division, United States General Accounting Office).

274. *Id.*

275. *Id.*

276. *Id.* at 10.

277. *Id.* at 11.

278. *Cleanup Costs Hearings, supra* note 251, at 13-4.

279. *Id.* at 14.

280. *Id.* at 12.

281. *Id.* at 16.

282. *Id.* at 17.

283. *Cleanup Costs Hearings, supra* note 251, at 17.

284. *Id.* at 17-20.

285. *Id.* at 11.

286. *Id.*

287. *Id.*

288. *Cleanup Costs Hearings, supra* note 251, at 242 (a copy of

the draft environmental costs principle submitted by GAO). The draft environmental costs principle states the following:

Clean Text of Revised Proposed Rule DAR Case 91-056

31.205-9 Environmental costs.

(a) Environmental costs--

(1) Are those costs incurred by a contractor for:

(i) The primary purpose of preventing environmental damage; properly disposing of waste generated by business operations; complying with environmental laws and regulations imposed by Federal, State, or local authorities; or

(ii) Correcting environmental damage.

(2) Do not include any costs resulting from a liability to a third party.

(b) Environmental costs in paragraph (a)(1)(i) of this subsection, generated by current operations, are allowable, except those resulting from violation of law, regulation, or compliance agreement.

(c) Environmental costs in paragraph (a)(1)(ii) of this subsection, incurred by the contractor to correct damage caused by its activity or inactivity, or for which it has been administratively or judicially determined to be liable (including where a settlement or consent decree has been issued), are unallowable, except when the contractor demonstrates that it:

(1) Was performing a Government contract at the time the conditions requiring correction were created and performance of that contract contributed to the creation of the conditions requiring correction;

(2) Was conducting its business prudently at the time the conditions requiring correction were created, in accordance with then-existing relevant standard industry practices, and in compliance with all then-existing environmental laws, regulations, permits, and compliance agreements;

(3) Acted promptly to minimize the damage and costs associated with correcting it; and

(4) Has exhausted or is diligently pursuing all available legal and contributory (e.g., insurance or indemnification) sources to defray the environmental costs.

(d) In cases where the current contractor is required to correct environmental damage which was caused by the activity or inactivity of a previous owner, user, or other lawful occupant of an affected property, the resulting environmental costs are unallowable, except when the current contractor demonstrates that:

(1) The previous owner, user, or other lawful occupant's actions satisfy the criteria in paragraphs (c)(1) through (3) of this subsection, and

(2) The current contractor has complied with paragraphs (c)(3) and (4) of this subsection during the period that it has owned, used, or occupied the property.

(e) Paragraphs (c) and (d) of this subsection do not apply to costs incurred in satisfying specific contractual requirements to correct environmental damage (e.g., where the Government contracts directly for the correction of environmental damage at a facility which it owns).

(f) Increased environmental costs resulting from the contractor's failure to obtain all insurance coverage specified in Government contracts are unallowable.

(g) Costs incurred in legal and other proceedings, and fines and penalties resulting from such proceedings, are governed by 31.205-47 and 31.205-15, respectively.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Cleanup Costs Hearings, supra* note 251, at 242.

294. *See generally Cleanup Costs Hearings, supra* note 251.

295. *Id.*

296. *Cleanup Costs Hearings, supra* note 251, at 242.

297. *Cleanup Costs Hearings, supra* note 251, at 37 (statement of

Sherri Wasserman Goodman, Deputy Secretary of Defense, Environmental Security).

298. *Id.* at 36-7.

299. *Id.* at 37.

300. *Id.* at 34.

301. *Id.*

302. FAR 31.201-3(a).

303. *Cleanup Costs Hearings*, *supra* note 251, at 242 (text of Revised Proposed Rule, DAR Case 91-056, para 31.205-9 Environmental Costs).

304. *Id.*

305. *Cleanup Costs Hearings*, *supra* note 251, at 92 (material submitted by the American Bar Association citing *In re; Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1027 (D.Mass. 1989); *U.S. v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985).

306. *Cleanup Costs Hearings*, *supra* note 251, at 242.

307. *Id.*

308. *Cleanup Costs Hearings*, *supra* note 251, at 96-8, 242 (statement by the American Bar Association, Section of Public Contract Law and the Clean Text of the Revised Proposed Rule).

309. *See supra* pp. 18-9.

310. *Id.*

311. *Cleanup Costs Hearings*, *supra* note 251, at 97 (statement by the American Bar Association, Section of Public Contract Law citing *AIU Ins. Co. v. Superior Court*, Cal. 3d 807 (1990)).

312. *Id.*

313. *Cleanup Cost Hearings*, *supra* note 251, at 242 (citing Clean Text of Revised Proposed Rule, 31.205-9 paragraph (c)(4)).

314. *Cleanup Costs Hearings*, *supra* note 251, at 98.

315. *Id.*

316. *Cleanup Costs Hearings*, *supra* note 251, at 103, 242.

317. *Cleanup Costs Hearings*, *supra* note 251, at 103.

318. *Id.*

319. *Id.*

320. 50 U.S.C. § 1431-1435 (1976).

321. 50 U.S.C. § 1431 (1976).

322. *See* Exec. Order No. 10789, 23 C.F.R. 8897 (1958); *as amended by* Exec. Order No. 11051, 27 C.F.R. 9683 (1962); Exec.

Order No. 11382, 32 C.F.R. 16247 (1967); Exec. Order No. 11610, 36 C.F.R. 13755 (1971); Exec. Order No. 12148, 44 C.F.R. 43239 (1979).

323. 50 U.S.C. § 1431 (1988).

324. REIMBURSEMENT OF DEFENSE CONTRACTORS' ENVIRONMENTAL CLEANUP COSTS: COMPREHENSIVE OVERSIGHT NEEDED TO PROTECT TAXPAYERS, FIFTH REPORT BY THE COMMITTEE ON GOVERNMENT OPERATIONS, H.R. Rep.No.103-408, 103d Cong., 1st Sess. 19-22 (1993) [hereinafter REIMBURSEMENT REPORT].

325. *Cleanup Costs Hearings*, *supra* note 251, at 7.

326. REIMBURSEMENT REPORT, *supra* note 324, at 20.

327. *See Cleanup Costs Hearings*, *supra* note 251, at 254-55 (material submitted by Gerald A. Cann, Assistant Secretary of the Navy, Research, Development and Acquisition).

328. *Id.* at 254.

329. *Id.*

330. *Id.* at 255.

331. 50 U.S.C. § 1431 (1988). *See also* REIMBURSEMENT REPORT, *supra* note 324, at 21.

332. REIMBURSEMENT REPORT, *supra* note 324, at 21.

333. *Cleanup Costs Hearings*, *supra* note 251, at 7 (testimony of Donna M. Heivilin).

334. *Id.*

335. *Cleanup Costs Hearings*, *supra* note 251, at 45 (statement of Deputy Under Secretary Goodman).

336. *Id.*

337. *Id.*

338. *Id.*

339. *Cleanup Costs Hearings*, *supra* note 251, at 22 ("This position would seem to be at odds with the underlying intent of Public Law 84-805, which requires congressional notification before funds are obligated. The committee is troubled by this interpretation of the notice provision of Public Law 85-804 and urges the Department to reassess its position.").

340. *Id.*

341. *Id.*

342. *Id.*

343. *See supra* pp. 40-44. *See also* Kelley v Environmental Protection Agency, 1994 U.S. App. LEXIS 1715 (1994).

344. *Lender Hearings*, *supra* note 12, at 18.

345. *See supra* pp. 24-28.

346. RIEGEL ET AL., *supra* note 16, at 1-32.

347. *Id.*

348. SUPERFUND REPORT, *supra* note 1, at 80-1.

349. *Id.*

350. *Id.* at 82.

351. *Id.* at 85-88 ("EPA generally considers all possible cleanup remedies without first establishing, with community input, what the cleanup goal should be at a particular Superfund site....

While EPA is not precluded from considering land use early in this process, it does not routinely do so. If EPA routinely assessed what the site's future use would be before assessing the cleanup alternatives, some of the alternatives could be eliminated at the start.").

352. National Oil and Hazardous Substances Pollution Contingency Plan, Final Rule, 55 Fed. Reg. 8666 (1990).

353. SUPERFUND REPORT, *supra* note 1, at 82-3.

354. *Id.* at 85-88.

355. *Id.* at 87.

356. SUPERFUND REPORT, *supra* note 1, at 167.
357. *Id.*
358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. SUPERFUND REPORT, *supra* note 1 at, 167.
363. *Id.* at 168.
364. *Id.*
365. *Id.*
366. *Id.* at 125-28.
367. 113 S.Ct 2891 (1993).
368. 15 U.S.C. § 1012(a) (1988).
369. 113 S.Ct. 2891 (1993).
370. *Id.* at 2897.
371. *Id.* (pre-1986 forms would have created a traditional "occurrence" policy and a "claims-made" policy without a retroactive date provision).

372. 113 S.Ct. 2891 (1993).